DORAI PANDIAN MUNIAN & ANOR A

v.

PP

COURT OF APPEAL, PUTRAJAYA B
MOHD GHAZALI YUSOFF JCA
SULONG MATJERAIE JCA
AHMAD MAAROP JCA
[CRIMINAL APPEALS NO: J-05-38-2006 & J-05-39-2006]
14 JANUARY 2009 C

CRIMINAL LAW: *Defence - Alibi - Accused giving elaborate narration about movements before, during and after offence - Failure to give notice of alibi - Whether amounted to alibi or merely bare denial*

CRIMINAL LAW: *Penal Code - Section 34 - Common intention - Murder - Accused deliberately participated in assault on deceased - Whether attack furtherance of common intention* D

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Appeal against conviction and sentence - Knife used in murder found in accused car - Accused identified in identification parade - Whether evidence of identification parade admissible - Defence of alibi - Failure to give notice of alibi - Whether adverse inference to be raised against prosecution for failure to call possible eye witnesses - Whether evidence of prosecution witness credible - Whether prosecution witness an interested witness - Whether conviction safe* E

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EVIDENCE: *Identification evidence - Identification parade - Murder accused identified in identification parade - Whether evidence of identification parade admissible - Whether identification parade properly conducted - Whether court can rely on evidence of dock identification - Evidence Act 1950, s. 9*

EVIDENCE: *Presumptions - Adverse inference under s. 114(g) Evidence Act 1950 - Whether adverse inference to be raised against prosecution for failure to call possible eye witnesses - Whether amounted to withholding or suppression of evidence* G

The accused persons, were jointly charged with the offences of murder under s. 302 of the Penal Code and read with s. 34 of the same Code. They were said to have murdered one Tong Tian Leong ('Ah Leong') and one Loo Teik Soon ('Ah Soon'). The prosecution's case was that the accused and the deceased were in a disco when a quarrel ensued between them. Later, the accused and the deceased met again outside the hotel where the second accused, who was carrying a knife, stabbed both the deceased. The first accused then took a brick and smashed the front and the rear screen of the deceased's car. PW10, a friend of both the deceased witnessed the incident. The first accused saw PW10 and H I

A grabbed the collar of her dress but later had let her go. The accused were subsequently arrested at an unnumbered house. A knife (in a sheath) was found in their car. In the identification parade held at the police station, PW9 and PW10 identified the accused. The defence contended that the identification evidence of PW9 and PW10 was very
B doubtful, wholly unsatisfactory, mistaken and could not be believed at all and should be rejected. The accused defence was that an unknown Indian male had stabbed the deceased. The defence also claimed that three friends of the second accused, who were said to have been squatting at a nearby guard post were not called by the prosecution and
C that this raised an adverse inference under s. 114(g) of the Evidence Act 1950 ('EA50'). The accused persons were thus found guilty of the charges and were sentenced to death. Hence this appeal against the conviction and sentence.

Held (dismissing appeals; affirming convictions and sentences)
D **Per Ahmad Maarop JCA delivering the judgment of the court:**

(1) The evidence of identification parade is relevant and admissible under s. 9 of the EA50, and can be used to corroborate the substantive evidence given by the witnesses in court on identification of the
E accused as the perpetrator of the alleged crime. It is well settled that the substantive evidence is the evidence of identification in court. In the circumstances of this case, defects relating to the identification parade including the opportunities for PW10 to see both the accused before the identification parade did not justify the rejection of the identification evidence given by PW10 in court; *Ong Poh Cheng v. PP*
F (refd). (para 31)

(2) To hold that an identification parade, must, in all circumstances, be conducted in order to sustain a conviction would be too stringent. Thus, even in a case where no identification parade is held, the
G court can rely on the evidence of the dock identification as sufficient basis for conviction if it is satisfied with the credibility and reliability of the witness giving the evidence of identification in court. This is where the well-known guidelines laid down in *R v. Turnbull* come into play. The *Turnbull* guidelines had been accepted in Malaysia.
H (para 35)

(3) The real tests for either accepting or rejecting the evidence of a witness are how consistent the story is with itself, how it stands the test of cross-examination, and how far it fits in with the rest of the evidence and the circumstances of the case. Being unshaken in
I cross-examination is not *per se* an all-sufficient acid test of credibility. The inherent probability or improbability of a fact in issue must be the prime consideration. (para 44)

(4) The learned judge found PW9's evidence on the identification of the second accused to be good. In the context of corroboration, PW10's evidence that the second accused was the person who stabbed Ah Leong and Ah Soon was corroborated by PW9's evidence. (para 46)

(5) PW10 was present in the whole incident witnessing the event inside and outside of the disco, and more importantly, the slaying of Ah Leong and Ah Soon which took place outside the hotel, at the parking area. Not only did she have sufficiently long period to observe what was done by the accused only a few feet from her in good lighting condition, she also had come face to face with the first accused when the latter held the collar of her dress. No reasonable doubt had been created in PW10's evidence. (para 55)

(6) Even if the fact that Ah Leong and Ah Soon were PW10's boyfriend and friend respectively had made PW10 an interested witness, there was no legal presumption that her evidence should not be believed, unless there were cogent reasons to disbelieve her in the light of the evidence to the contrary and the surrounding circumstances; *Balasingam v. PP* (refd). (para 61)

(7) Adverse inference under s. 114(g) EA50 can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. There were no such withholding or suppression of evidence. The prosecution had adduced evidence to show various attempts to serve subpoenas for the various hearing dates on the accused friends. All these attempts proved futile as those witnesses could not be found at their available addresses. Evidence was also adduced to show efforts by the police to locate those witnesses by various advertisements in several newspapers. In a criminal case, the prosecution, provided that there is no wrong motive, has a discretion as to what witnesses should be called by it; *Munusamy v. PP* (refd); *Mohd Shamshir Md Rashid v. PP* (refd); *Khoon Chye Hin v. PP* (refd); *PP v. Datuk Seri Anwar Ibrahim (No. 3)* (refd). (para 67)

(8) Common intention can be formed in the course of occurrence and on a spur of moment. In the present case, far from taking action to dissociate himself from the assault, the first accused had deliberately participated in the assault on Ah Leong by carrying his own attack on the latter. The attack by the first accused on Ah Leong was carried out in furtherance of the common intention of both accused. (para 72)

(9) In support of his story that he was not at the scene at the material time, the second accused had given an elaborate narration about his movements before, during and after the time of the offences. The evidence of the second accused was not evidence of bare denial but detailed evidence in support of an alibi. Be that as it may, although he found the second accused's defence to be an alibi without a notice, the learned judge nevertheless proceeded to consider in depth the second accused's defence as though it was a denial, as well the evidence of his two witnesses. Nevertheless, the second accused had failed to raise any reasonable doubt on the charges. (para 79)

Case(s) referred to:

Abdullah Zawawi Omar v. PP [1985] 2 CLJ 2; [1985] CLJ (Rep) 19 SC ***(refd)***
Adel Muhamed El Dabah v. Attoney General of Palestine [1944] AC 168 ***(refd)***
Andy Bagindah v. PP [2000] 3 CLJ 289 CA ***(refd)***
Arumugam Muthusamy v. PP [1998] 3 CLJ 597 FC ***(refd)***
Balasingham v. PP [1959] 1 LNS 8 HC ***(refd)***
Bhagoji v. Hyderabad Government [1954] Cri LJ 1378 ***(refd)***
Bhojraj v. Sitaram AIR 1936 PC 60 ***(refd)***
Chimanbhai Ukabhai v. State of Gujarat AIR 1983 484 ***(refd)***
Dato' Mokhtar Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC ***(refd)***
De Silva v. PP [1964] 1 LNS 32 HC ***(refd)***
Heng Aik Ren Thomas v. Public Prosecutor [1998] 3 SLR 465 ***(foll)***
Hussin Sillit v. PP [1988] 2 CLJ 9; [1988] 1 CLJ (Rep) 128 SC ***(refd)***
Khoon Chye Hin v. PP [1961] 1 LNS 41 HC ***(refd)***
Ku Lip See v. PP [1981] 1 LNS 155 FC ***(refd)***
Malkhansingh v. State of Madya Pradesh [2003] Cri LJ 3535 ***(refd)***
Mohd Shamshir Md Rasid v. PP [2009] 6 CLJ 208 FC ***(refd)***
Mohinder Singh v. The State [1953] Cri LJ 1761 ***(refd)***
Muniandy & Ors v. PP [1966] 1 LNS 110 FC ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***
Nembhard v. The Queen [1981] 74 Cr App R 144 ***(refd)***
Ong Poh Cheng v. PP [1998] 4 CLJ 1 CA ***(refd)***
PP v. Dato' Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 HC ***(refd)***
PP v. Datuk Haji Harun Haji Idris (No 2) [1976] 1 LNS 97 HC ***(refd)***
Prem Chand v. The State [1996] Cri LJ 1217 ***(refd)***
R v. Long [1973] 57 Cr App R 871 ***(refd)***
R v. Turnbull [1976] 3 All ER 549 ***(foll)***
Rangapula Ramasamy & Anor v. PP [1981] CLJ 129; [1981] CLJ (Rep) 261 HC ***(refd)***
Ryan v. Jarvis [2005] UPKC 27 ***(refd)***
Sabarudin Non v. PP & Other Appeals [2005] 1 CLJ 466 CA ***(foll)***
Somappa v. State of Mysore [1979] Cri LJ 1358 ***(refd)***
State of Rajasthan v. Shiv Singh [1962] (1) Cri LJ 82 ***(refd)***
State of UP v. Krishna Gopal AIR 1988 2154 ***(refd)***

Tan Kim Hoo v. PP & Another Appeal [2007] 6 CLJ 557 CA ***(refd)***
Teoh Hoe Chye v. PP & Another Case [1987] 1 CLJ 471; [1987] CLJ (Rep) 386 SC ***(refd)***
Ugar v. State of Bihar AIR 1965 SC 277 ***(refd)***
Vaikuntam Chandrappa v. State of AP [1960] Cri LJ 1681 ***(refd)***
Vasan Singh v. PP [1989] 2 CLJ 402; [1989] 1 CLJ (Rep) 166 SC ***(refd)***
Yau Heng Fang v. PP [1985] 2 CLJ 22; [1985] CLJ (Rep) 350 SC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 402A(1)
Evidence Act 1950, ss. 9, 114(g)
Penal Code, ss. 34, 300, 302, 304(b)

Criminal Justice Act 1967 [UK], s. 11(8)
Penal Code [India], ss. 34, 302

Other source(s) referred to:
Sarkar, *Law of Evidence*, 16th edn, 2007, p 140

For the 1st accused - Gobind Singh Deo, M/s Gobind Singh Deo & Co
For the 2nd accused - Subramaniam Nair, M/s Maniam Nair & Co
For the respondent - Roslan Mat Nor; DPP

[Appeal from High Court, Muar; Criminal Trial No: 45-16-2000]

Reported by Amutha Suppayah

JUDGMENT

Ahmad Maarop JCA:

The Appeals

[1] This judgment concerns two appeals - J-05-38-2006 (the first appeal) and J-05-39-2006 (the second appeal). Both appeals arise from the joint trial of the appellants in the High Court. In this judgment we shall refer to the appellants in the first and the second appeals as the first accused and the second accused respectively.

[2] The first accused and the second accused (referred to respectively as "OKT1" and "OKT2" in the judgment of the High Court), were jointly charged in the High Court with the following offences of murder punishable under s. 302 of the Penal Code and read with s. 34 of the same Code:

A 1st Charge

Bahawa kamu bersama-sama pada 24.04.1999 jam lebih kurang 2.30 pagi di perkarangan tempat letak kereta Hotel Sri Pelangi, dalam Daerah Segamat, di dalam Negeri Johor, dengan niat bersama telah melakukan kesalahan bunuh, iaitu menyebabkan kematian Tong Tian
B Leong (L) KPT: 740515-01-6399, dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum dibawah Seksyen 302 Kanun Keseksaan dan dibaca bersama Seksyen 34 Kanun yang sama.

2nd Charge

C Bahawa kamu bersama-sama pada 24.04.1999 jam lebih kurang 2.30 pagi di perkarangan tempat letak kereta Hotel Sri Pelangi, dalam Daerah Segamat, di dalam Negeri Johor, dengan niat bersama telah melakukan kesalahan bunuh, iaitu menyebabkan kematian Loo Teik Soon (L) KPT: 730706-01-6333, dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum dibawah Seksyen 302
D Kanun Keseksaan dan di baca bersama Seksyen 34 Kanun yang sama.

[3] At the close of the prosecution's case, the High Court:

(a) called on the first accused to enter on his defence on the first charge, but acquitted and discharged him on the second charge;

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(b) called upon the second accused to enter on his defence on the first and the second charges.

[4] At the end of the case the High Court found the first accused guilty of the first charge, convicted him and sentenced him to death.
F He appealed against that decision. Hence, the first appeal.

[5] The High Court found the second accused guilty of the first and the second charges, convicted him and sentenced him to death. He appealed against that decision. Hence, the second appeal.

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The Prosecution's Case

[6] The prosecution's case is as follows: On 24 April 1999, Normalaziah bt Malik (SP10) was a waitress at the Pelangi Disco (the disco), Pelangi Hotel Segamat. Her working hours were from 10pm to
H 3am. At about 12.30am on 24 April 1999, PW10 was seated with the deceased Tong Tian Leong (Ah Leong), the deceased Loo Teik Soon (Ah Soon) and three or four other persons. At about that time there was a quarrel in the disco. Ah Leong was drinking beer from a glass. That glass fell and hit the first accused who was in front of them. Ah
I Leong apologised to the first accused. PW10, Ah Leong and Ah Soon then left the disco, but the first accused followed them. Together with the first accused were two other persons of Indian descent. At the door of the disco, the first accused pushed Ah Leong, resulting in a scuffle

between the two of them, in the course of which the first accused hit and shattered the glass door of the the disco. The first accused then picked up a shard of glass and tried to thrust it at Ah Leong. Ah Leong did not retreat. He demanded an apology from the first accused. The first accused ran away.

[7] PW10, Ah Leong and Ah Soon then walked to the car park at the back of the hotel. They got into the car and Ah Soon drove it off. At the front of the hotel, the first accused called out for Ah Leong. Ah Soon alighted from the car, followed by Ah Leong. The first accused, who was at the front door of the hotel, walked towards Ah Soon. Then the second accused, who was carrying a knife, emerged from the rear of the first accused. At that time Ah Soon was in front of the car while Ah Leong was behind the car. The second accused ran towards Ah Soon and stabbed Ah Soon twice. After that the second accused moved towards Ah Leong and stabbed Ah Leong thrice. Then the first accused took a brick and smashed the front and the rear screen of the car. Next, the first accused, with a brick with him moved towards Ah Leong. All these events were witnessed by PW10 who was then in the car. Later, PW10 got out of the car and tried to hide at the parking lot on the right of the car (somewhere at the place marked "R" in the sketch plan (exh. P25)). The first accused saw PW10 and grabbed the collar of her dress. Then the first accused turned back and moved his hand as if asking for something. PW10 said to the first accused that she was a woman and was not involved in the fight. The first accused pulled and pushed her and the third button of her dress came off. The first accused then released his hold from PW10's dress and fled the scene. PW10 ran over to Ah Leong who was then covered in blood. PW10 did not know if Ah Leong was still alive. A crowd gathered but offered no assistance. Later, Wong Kok Shoon, a brother-in-law of Ah Leong sent Ah Leong and Ah Soon to the hospital.

[8] On 25 April 1999, the pathologist, Dr. Shahidan Md. Nor (PW7) conducted post-morterms on Ah Leong and Ah Soon. Apart from the several abrasions on the head, shoulders and thumb and two lacerations (on the inner right eyebrow and the middle lower lip of the mouth), PW7 found two deep stab wounds on the right chest of Ah Leong. The first stab wound was 4 x 1.5cm horizontal on the right chest. Its inner end was 10cm below the suprasternal notch and abrased. It was 10cm deep and directed downwards and outwards. It entered the right 3rd intercostal space and the base of the pericardial sac. The second stab wound was 3 x 1cm on the lower right chest 7cm below the nipple. It was 10cm deep and directed downwards and outwards. It entered the right 6th intercostals space outer to costochondral junction, and cut the right hemidiaphragm at the front of the liver and tunnelled it for 7cm. PW7 also found a crack fracture

7cm horizontal on the left parietal bone of Ah Leong, which corresponded at the middle meningeal artery commencement and extended into the left anterior fossa. PW7 also found that the left orbital roof was fractured 5cm. The right orbital ridge was depressed and crossed the midline and breached both anterior fossae. PW7 found that the brain was mildly swollen and oedimatous. There was generalised subarachnoid haemorrhages which was especially thick on the left side. There were also focal contusions on the under surfaces of both frontal lobes. Serial sectioning showed extension of the bleeding into the ventricular system. PW7 found that Ah Leong's left lung had collapsed and his pericardial sac was cut. PW7 opined that the stab wounds on Ah Leong was caused by a sharp object such as a knife, that the head injuries were caused by something blunt and that the cause of death was the chest and the head injuries. Later, PW7 corrected himself and said that there was a third stab wound below the left chest of Ah Leong.

[9] On Ah Soon, PW7 found the following injuries:

(a) Right black eye more so in the upper lid,

(b) Abrasion on upper right eyelid,

(c) Three abrasions 3.5 x 1.5cm on outer right forehead and 1x0.5cm at the hairline,

(d) Bruised right forehead 7cm in diameter,

(e) Bruise 2.5 x 1.5cm over inner right eyebrow,

(f) Abrasion with bruised area 2 x 1cm on dorsum base of right index finger,

(g) Abrasion in a bruised area 3 x 2cm on outer left forehead,

(h) Bruised upper lip of mouth,

(i) Abrasion in a bruised area 4 x 2cm on lower part back of left forearm 5cm above the wrist,

(j) Abrasion linear 8 x 0.5cm on dorsum of left hand from the wrist distally,

(k) Abrasion 2 x 1cm outer upper left knee,

(l) Abrasion 3 x 1.5cm outer lower left knee,

(m) Abrasion 6 x 1.5cm on the chest below notch,

(n) Abrasion 3 x 2cm on left chest inner and below nipple,

(o) Stab wound 3.5 x 1cm and 10cm deep on upper left chest 2cm below the notch and 3cm from sternum. Its upper end was abrased and directed backwards and outwards. It cut the left 2nd rib for 2cm and breached the 2nd left intercostal space, and

(p) Stab wound 3 x 1cm horizontal and 10cm deep on the right chest. It was 14cm below the suprasternal notch and 6cm to the right. It was directed to the left and backwards and its outer end was abrased. The right 5th rib was cut for 4cm and 4cm from the sternum.

PW7 found that both lungs of Ah Soon had collapsed and that his heart had been cut. He certified the cause of death to be chest injuries. PW7 opined that the injuries to the chest were caused by a sharp and pointed object. The bruises to the head were caused by a blunt object.

[10] On 24 April 1999 at about 8am, Chief Inspector K Kumar (SP13) and a police party arrived at an unnumbered house at Kampung Simpang Loi, Segamat. Motorcar JEF 2200 was found parked outside the house. Upon searching the house, PW13 found the first and the second accused and two other male Indians sleeping in the house. PW13 arrested them. From the second accused, PW13 obtained the key of the motorcar JEF 2200. Then, in the presence of the first and the second accused, PW13 searched the motorcar. PW13 found a knife (in a sheath), measuring 25.5cm from underneath the rubber-mat on the floor infront of the front passenger seat.

[11] In the identification parade held by Chief Inspector Nadzri b Mustaffa (PW16) on 26 April 1999 at the Batu Anam Police Station, PW10 identified the first and the second accused.

[12] In the identification parade held by Inspector Basiron b Abdul Karim (PW17) on 1 May 1999 at the Batu Anam Police Station, Ng Kim Poh (PW9) identified the second accused.

The Defence Case

The First Accused's Case

[13] The first accused elected to give evidence on oath. The substance of the first accused evidence in his defence is as follows. On 23 April 1999, he and five friends including the second accused, went to Segamat to meet Pak Yusof, a bomoh. On arrival at Pak Yusof's house they were informed by Pak Yusof's wife that Pak Yusof was not at home. After informing Pak Yusof's wife that they would come to the house again the following day, the first accused and his friends went to Segamat town and checked into the Sri Pelangi Hotel.

[14] At about 9 - 9.20pm, the first accused and two of his friends by the name of Sivakumar and Sankar went to have their dinner at a restaurant in Kampung Kauri, Segamat. They arrived back at the hotel at about 11pm - 12midnight. On arrival at the hotel, the first accused went to the second accused room to send some food for the latter. Then at about 12midnight, the first accused went to the disco. At the disco, he sat down with Sivakumar and Sankar. They drank beer and danced. According to the first accused, while he was dancing, there was an argument between two groups of patrons of Chinese descent. One of the persons from one of the two groups threw a glass in the first accused's direction and it hit his right leg. He stopped dancing. About five minutes later, another glass was thrown at him which hit his chest. He went over to the person who threw those glasses and asked that person why he threw those glasses at him. That person did not reply. Instead, that person grabbed his shirt. Then, two other persons came and dragged the first accused out of the disco. He spoke to the three persons. Suddenly, one of them struck him with a mug. This took place outside the disco, near the door. The other two persons also began to beat him. The first accused ran and tried to enter the disco. The two persons chased him and pushed him from behind. He crashed onto the glass door of the disco, shattering it into pieces. He fell and was injured on his palm, ear and leg. He got up and the two persons tried to beat him. He took a shard of glass and told them that if they come close to him, he would do something. The two persons told him that they would not beat him if he threw away the shard of glass. The first accused threw away the shard of glass, and they retreated. The first accused left the place and went up to the room which he, the second accused, Sankar and Sivakumar had rented. He knocked at the door. There was no reply. He went to the second room which was rented by Jeevakumar and Santi. He knocked at the door. There was also no reply. At that time he was bleeding. He went back to the first room. At that time Sivakumar and Sankar had arrived at the first room. Three of them entered the room. The first accused went straight to the bathroom to wash away the traces of blood from his body. When he came out of the bathroom, the second accused had awakened from his sleep. The second accused asked him why were there blood stains? He told the second accused that he was beaten by three persons. The second accused then said that all of them should leave the hotel immediately and look for Pak Yusof.

[15] The first accused, Sivakumar and Sankar first left the room, as the second accused said he needed to dress up. The second accused told them to check out of the hotel and wait in their car which they did. While Sivakumar went to the reception counter and Sankar went to get their car, the first accused waited for the second accused near the lift. The first accused waited for five minutes, but the second accused

still did not come down. He wanted to follow Sankar but the Sankar had left the reception counter. Then the first accused left the lift area to look for Sankar. The first accused said that the two persons who had beaten him up were outside the porch talking to the hotel guard. The two persons saw him. They asked him, "Tadi yang awak kena belasah tak cukupkah?". The first accused was scared. He saw that there was a stationary car beside them with two of its doors open. He identified it as the deceased's car. The two persons moved closer to him. Then suddenly, an Indian male with a knife emerged from behind him and proceeded to the two persons and stabbed them in succession. The first accused said that on seeing this he panicked and did not know what to do. According to the first accused, after stabbing the two Chinese, the Indian male said something to the people near the scene, but the first accused did not understand what was said by the Indian male. The Indian male then ran away from the scene. The first accused said after the Indian male fled, he waited at the scene for about 10 - 15 minutes. After 10 - 15 minutes he took a stone and threw it at the screen of the car. He said he did so because he was beaten up by the two Chinese male and he was angry and he panicked (saya rasa marah dan panik). The stone shattered the rear screen of the car. He then went to the rear of the car and found a Chinese male lying there. He kicked the Chinese male two or three times. He also punched the latter two to three times. There was no response from the latter. After punching and kicking the Chinese male, he saw a Malay woman appearing from the side of the car. He grabbed the woman's dress and scolded her. Then someone called his name from the direction of the guard post there. He released the woman and ran towards the guard post. When he reached the guard's post, Sankar asked him to get into their car.

Under cross-examination, the first accused agreed with the second accused's counsel that it was not the second accused who stabbed the deceased.

The Second Accused's Case

[16] The second accused also elected to give evidence on oath. The substance of his evidence in his defence is as follows. He gave evidence similar to that of the first accused regarding the purpose of his and his friends' visit to Segamat. The second accused said that he and his friends checked into two rooms at the Sri Pelangi Hotel, Segamat. He, Sankar, Sivakumar, and the first accused occupied one room, while Jivakumar and Shanti accupied the other. He had a bath and then went to sleep at about 2.00 or 2.30pm. At about 3.00 or 3.30pm, Jivakumar telephoned his room and invited him to go out to eat. He and Sankar got out of their room, and together with Jivakumar and Shanti, they proceeded to Segamat where they had their food. Sivakumar and the

first accused remained in the room. At about 4.30pm, the second accused, Sankar, Jivakumar and Shanti returned to the hotel. After having conversation with Sankar, at about 5.10pm, the second accused went to sleep. At about 9pm, he was awakened by one of his friends who occupied the same room. The first accused, Sankar and Sivakumar invited him to go out for dinner. He declined and continued to sleep in the room alone. Later, just before 12midnight, the first accused returned to room and gave him some packed food. The first accused invited him to go to the disco. He declined. He had a bath, ate his food and watched television. 15 minutes later he went back to sleep. Later, he was awakened by one of his friends. He could not remember the time. He got up and sat on the bed. When he opened his eyes, he saw that there were blood stains on the ears and palm of the first accused. Before he could ask, the first accused told him that he (the first accused) had been beaten up. At that time Sivakumar and Sankar were also in the room. He told them to check out of the hotel and proceed straight away to Pak Yusof's house. He also told them that problem could arise if they were to remain in the hotel. They left the room. He washed his face. He was in the room for about 20 minutes after they left. Then he left the room and proceeded to the reception counter. Upon finding that the first accused, Sankar and Sivakumar were not at the counter, he proceeded to the porch of the hotel. At the porch (marked E in exh. P25), he heard sounds coming from the side of the hotel (from the place marked N in exh. P25). He saw more than ten persons moving about. He said, "Mereka tengah sibuk-sibuk." He proceeded to the guard post. He marked the route he took from the porch (E in exh. P25) to the guard post (F in exh. P25) by drawing dotted lines in D44, which is a copy of the sketch plan P25. Effectively, the second accused said that in proceeding to the guard post from the porch, he had taken a path away from the place where the bodies of Ah Leong and Ah Soon were lying on the road somewhere at the places marked N and O respectively in P25. At the guard post he saw a car proceeding in the direction of the guard post. On seeing this, he stood up. The car stopped infront of him. It was driven by Sankar. He got into the car and sat next to Sankar. Sivakumar was seated at the back. The first accused was not in the car. Sankar asked, "Mana Dorai Pandian?". The second accused replied. "Dia ikut kamu, mengapa tanya saya". Sankar got out of the car and called out loudly for the first accused. The first accused ran towards the car, got into it and sat at the rear. They then proceeded to Pak Yusof's house. At Pak Yusof's house, he took a drink and slept on the sofa. At about 6.30am, he was arrested by the police. He denied giving any car key to the police. He further testified that he had not left his hotel room, had not gone to the disco and had not quarrelled with anyone. He maintained that he had not stabbed anyone. The learned trial judge in his judgment said that the defence of the second accused smacked of an alibi. More of this later when we deal with the issue of alibi.

Submissions

The First Accused

[17] Before us the main complaint advanced by learned counsel for the first accused was that the learned trial judge omitted to consider certain vital facts in the evidence of PW9 and PW10, which learned counsel contended indicated a lack of judicial appreciation of the evidence. This, he submitted had occasioned a misdirection by way of non-direction. In this regard, learned counsel contended that the learned trial judge failed to consider serious omission in PW10's evidence which would have been in favour of the first accused. Learned counsel specifically referred to PW9's evidence that when he (PW9) came out of the disco again, he saw Ah Leong and Ah Soon lying on the road in front of the disco, and that, as he and another captain was about to move closer to Ah Leong and Ah Soon, he saw the second accused holding a knife and heard the latter threatening "siapa nak campur, saya akan cucuk". Learned counsel pointed out that that was a very vital part of the prosecution's evidence. Yet, he submitted, nowhere in PW10's evidence did she mention that most serious part, although she claimed that she had witnessed the whole incident.

[18] It was also submitted by learned counsel that since PW10 was in the car at the material time and that since she said she was scared and she tried not to be seen (semasa itu saya berasa takut. Saya cuba untuk mengelak daripada dilihat oleh lelaki-lelaki India itu), she could not have seen Ah Leong being stabbed outside the car at the rear.

[19] Concluding his submission on PW10's evidence, learned counsel contended that the learned trial judge failed to remind himself of the possibility of PW10's evidence being tainted because Ah Leong was SP10's boyfriend and Ah Soon was her friend.

[20] Continuing on his submission, learned counsel said that there seemed to be no dispute that there was an argument in the disco involving the first accused, and that the first accused ran through the glass door of the disco. Recounting the facts revealed by the evidence, learned counsel said that then there was an incident outside the main door of the hotel. He said after the car stopped, an Indian person came from the rear of the first accused and stabbed the deceased. He said about ten minutes after the stabbing, the first accused smashed a brick onto the windscreen of the car. Learned counsel said that the issue was whether there was evidence to prove conclusively that the first accused struck Ah Leong's head with a brick, and whether the injuries on the latter's head were infact caused by the brick struck by the first accused?

[21] Further in his submission, learned counsel complained that the learned trial judge completely overlooked the evidence of the pathologist (PW7) under cross-examination that, "the head injuries to both deceased were caused by a blunt object. It would have been caused by a fall". He submitted that this possibility was strengthened by PW18's evidence that he found two bricks in the deceased's car. Elaborating on this point, learned counsel submitted that although the knife recovered in this case was shown to PW7 when he was giving evidence, none of the bricks recovered from the deceased's car was shown to him. Learned counsel submitted that the failure by the prosecution to show the brick to the PW7 when he was giving evidence, and to ask PW7 whether the brick could have caused Ah Leong's head injuries, was fatal. In support he referred to *Bhagoji v. Hyderabad Government* [1954] Cri LJ 1378 and *Mohinder Singh v. The State* [1953] Cri LJ 1761. Learned counsel argued that the learned trial judge should have treated with extreme caution with regard to SP10's evidence especially on the vital issue whether the first accused struck Ah Leong's head with a brick.

[22] The next point raised on behalf of the first accused concerned three friends of the second accused, who, according to PW9 were squatting at the guard post, at the time when PW9 saw the second accused holding a knife. Learned counsel submitted that none of the three friends of the second accused was called by the prosecution and this he contended, had raised adverse inference under s. 114(g) of the Evidence Act 1950.

[23] The last point raised by learned counsel concerned common intention in respect of which he contended that the learned trial judge had erred.

The Second Accused

[24] The thrust of the submission of learned counsel for the second accused was that the evidence of identification against the second accused was highly unsatisfactory and that it was unsafe for the court to rely on it. In support of this contention he raised two main points. Firstly, he contended that the identification parade in this case had been badly and unfairly conducted, and should be rejected. He submitted that once the identification parade evidence had been rejected, the court should not convict the second accused on the evidence of dock identification. Secondly, learned counsel attacked the evidence of PW9 and PW10 which he contended was lacking in credibility. In this regard learned counsel drew our attention to several discrepancies in and between the evidence of PW9 and PW10, some of which had also been covered by learned counsel for the first accused in his submission.

[25] Learned counsel for the second accused also submitted on the defence of the second accused. He contended that the learned trial judge had failed to appreciate the defence. Learned counsel contended that the second accused's defence was not *alibi*, but a denial. In support of this he relied on *Vasan Singh v. PP* [1989] 2 CLJ 402; [1989] 1 CLJ (Rep) 166, SC. He submitted that the learned trial judge should have accepted the evidence of the second accused.

Decision

[26] The issue which lies at the heart of this case is identification. Indeed, at the outset of his submission, learned counsel for the second accused declared that the main point of his submission would be on identification. Elaborating on his submission that the identification parades had been badly and unfairly conducted, he pointed out the various defects relating to the identification parades, of which we need only highlight one on which learned counsel had argued at length. This is with regard to the alleged opportunities for PW9 and PW10 to see the accused before the parades. With regard to PW9, we find no evidence to create a reasonable doubt that PW9 had the opportunity to see the second accused before he took part in the identification parade in which he positively identified the second accused as the person who stood near Ah Leong's body holding a knife. Although PW9 said that before the identification parade he was talking to ASP Gan Chip Pho (PW18) in the latter's room, PW9 had denied the suggestion by learned counsel that PW18 had indicated to him who to identify in the parade.

[27] In respect of PW10, learned counsel contended that PW10 had three opportunities to observe the first and second accused before the identification parade on 26 April 1999. The first opportunity occurred on 24 April 1999 when PW18 came out of the balai with PW10 to go to the scene of the crimes. At that time PW13 arrived with four suspects including both the accused. The second opportunity took place at about 7am to 8am on 24 April 1999. Under cross-examination PW10 said that at about that time she was in the office of PW18. From PW18's office she was taken to the first floor to see four male Indians who had been arrested. From a room on the first floor, through a small window, she saw both the accused and another person. When the police asked her whether those people were involved, PW10 replied in the affirmative.

[28] Learned counsel contended that there was yet another opportunity for PW10 (and even PW9) to see the accused before the parade. Apparently, this contention was based on the observation made by learned counsel when he visited Balai Polis Batu Anam with the learned trial judge and the learned DPP. Learned counsel's written submission on this is as follows:

A Both the witnesses had another opportunity to see the suspects who were then placed in the lock up at Balai Polis Batu Anam when SP9 and SP10 were brought into Balai before entering the OCS's room. If one were to stand at the Enquiry Office outside the OCS's room, one could see clearly the persons standing behind the grill. The learned trial judge visited the Balai and we respect the findings of the trial
B court, but nevertheless we wish to stress a point here that both the counsels who were also present at the Balai Polis were of opinion that the visibility is clear; and that we could make out the two suspects inside the lock up were OKT 1 and OKT 2 from the main entrance of Balai Polis Batu Anam although we did not know the suspects were brought in and were kept there by the police before our arrival.
C Therefore, although SP9 and SP10 could deny that they on the day of ID Parade could not see the suspects at the lock up from where they were standing (which is a very short distance [between 7 – 10 feet]) in a broad day light with the lighting inside the Balai then their evidence should be seen with suspicion. (see page 407 - line 5 - 11).

D **[29]** It appears to us that learned counsel did not accept the finding of the learned judge which was made by him after visiting the balai polis at Batu Anam together with both counsel and the DPP on 1 August 2002. The learned trial judge did not seem to share the views expressed in the submission of the learned counsel as aforesaid. This is evident
E from the notes of the proceeding at pp. 405 - 407, of the Appeal Record, vol. 2:

Mahkamah : Before continuing with the trial, the court wishes to record the proceedings that took place at the Balai Polis Batu Anam on 1.8.02. It would not be recorded earlier,
F as this is the first sitting after 1.8.02.

The following were the events at Batu Anam Polis Station on 1.8.2002.

11.00 : Court sampai di Balai Polis Batu Anam.

G Yang hadir : Encik Subramaniam bagi pihak OKT2 dan Stand in bagi pihak OKT1.

Tuan Azari – DPP

Kpl. Rais, OCS Balai Polis Batu Anam.

H Juga hadir SP18, Encik Gan

Mahkamah berdiri di tempat pintu besar Balai Polis Batu Anam. Mahkamah bertanya SP18 sama ada kedudukan balai dan setiap bilik pada ketika ini adalah sama seperti P29 dan P30.

I Encik Gan : Bukan saya yang buat P29 dan P30.

In presence of both counsel and followed by Encik Subramaniam, the court took two steps into the balai, facing straight ahead. Mahkamah observes that as one

enters the balai from the main entrance, one would need a special effort to turn to the right to observe the pintu grill on the right. In other words, the lock up in the balai is not within one natural view as one enters the balai. By turning sharply to the right, it is possible to make out the presence of persons behind the pintu grill.

The court observes, the presence of two persons of Indian descent behind the pintu grill. The court could see that they are not wearing spectacles but both sport a moustache. The court finds it hard to make out the facial features, because the persons are behind the bars of the pintu grill, which blocks a clear sight of the faces.

The court takes two further steps into the balai, now all view of the persons behind the pintu grill is obscured.

The court finds that the pintu grill would not be easily observed, enters, attention has been drawn to it beforehand. An uninformed visitor may miss the presence of the pintu grill altogether.

11.16am : Mr. Gobind arrives.

Maniam : I wish that the court would walk from main door to door of bilik 1.

Court proceeds to bilik 1. Court finds that by proceeding to bilik 1, then would be a better angle of sight to observe the presence of the pintu grill. Nevertheless, the view of persons behind the pintu grill would are still obscured by the bars of the pintu grill.

Court is being informed that the persons behind the pintu grill are the accused. Court would not know that fact if not told. Their faces are obscured.

DPP : I confirm the persons behind pintu grill are the accused.

Court now retraces its step to the main door. Standing at the main door, court cannot make out that the persons behind pintu grill are the accused.

Standing one or two steps into the balai, the court still could make out that the persons behind the pintu grill are the accused. The angle of right is now more acute.

DPP : I confirm that above had taken place in my presence.

[30] In our view, on the matter under discussion, this court must respectfully defer to the findings of the learned trial judge which were arrived at by him after visiting the balai polis at Batu Anam. Thus, we find no merit in learned counsel's submission on the third opportunity for PW10 (and another opportunity for PW9) to see the accused before the identification parades. We find no sufficient evidence to support that contention. This bring's us back to the thrust of learned counsel's submission. In this regard, concluding on his submission that the identification parades in this case were badly and unfairly conducted, he contended that the identification parade evidence should be rejected. He submitted that if the identification parade evidence was rejected, the court should not convict the second accused based on the evidence of dock identification. We do not agree. As we will demonstrate shortly, such a proposition is not supported by established authorities on the subject.

[31] The holding of an identification parade is a part of the investigation process carried out by the investigating authority. The evidence of the identification parade is relevant and admissible under s. 9 of the Evidence Act 1950, and can be used to corroborate the substantive evidence given by the witnesses in court on identification of the accused as the perpetrator of the alleged crime. It is well settled that the substantive evidence is the evidence of identification in court. In the circumstances of this case, we do not think that the defects relating to the identification parade including the opportunities for PW10 to see both the accused on 24 April 1999 (before the identification parade on 26 April 1999), as submitted by learned counsel, justifies the rejection of the identification evidence given by PW10 in court. In *Ong Poh Cheng v. PP* [1998] 4 CLJ 1, at p. 6, Shaik Daud Ismail JCA delivering the judgment of this court said:

> It does not follow, as a matter of course, that just because the learned judge rejected the identification at the identification parade, he must of necessity also reject the dock identification of the appellant. He rejected it not because there was no identification of the appellant as the robber, but because there were defects in the conduct of the parade (the appellant was in fact identified). In the light of this we find that his rejection of the evidence of the identification at the identification parade was in no way fatal to the dock identification of the appellant as the robber.

[32] In *Somappa v. State of Mysore* [1979] Cri LJ 1358, the three accused were charged with murder under s. 302 of the Indian Penal Code read with s. 34 of the same Code. The trial court found that the prosecution had failed to prove the case against the three accused and acquitted all of them. The State of Mysore preferred an appeal to the High Court against the said acquittals. The High Court allowed the

state's appeal in respect of the first and the second accused, found them guilty of an offence under s. 302 of the Indian Penal Code read with s. 34 of the same Code, and sentenced each of them to rigorous imprisonment for life. The High Court dismissed the appeal of the state in so far as the third accused was concerned. Leave to appeal to the Supreme Court was granted to the first and second accused. From the evidence adduced by the prosecution, the attack on the deceased by the three accused which took place on 29 May 1970, was witnessed by PW4 to PW7 and PW11 to PW14. The witnesses rushed towards the accused, surrounded the first and the second accused and caught hold of them. However, the second accused who was being held by PW7 and PW14 managed to free himself from their grip and escaped. The third accused also escaped. On 26 October 1970 the second and the third accused surrendered and an identification parade was held on 10 November 1970. Learned counsel for the first and the second accused challenged the identification parade as being unreliable. This was what the Supreme Court said in dealing with the said challenge:

> The learned counsel challenged the identification parade held by PW31, Taluka Magistrate, as being unreliable. *The trial court was of the view that it cannot be said from the evidence on record that the witnesses had no opportunity to see the accused till they identified them in the identification parade held in the jail. There is no evidence worth the name adduced by the prosecution to show that precautions were taken and if at all any precaution was taken to see that the witnesses either did not see the accused or they had no opportunity to see them before the identification parade.* The learned counsel was justified in his comment that the second accused was arrested a few days earlier and that he was in police custody and that he was produced before the Magistrate for remand and that there is nothing in the Panchnama prepared by the Taluka Magistrate to show that either he questioned the accused if he was shown to the witnesses or he himself questioned the witnesses if they had seen the accused. The High Court rejected the evidence regarding identification of A-3. Considering all the circumstances we think much reliance cannot be placed on the identification parade regarding the establishment of the identity of the third accused. As far as A-1 and A-2 are concerned it is clear that both of them were apprehended and the witnesses had ample opportunity to note their features at that time and identify them. *The proceeding in the identification parade discloses that A-2 was identified by most of the eye-witnesses. Because of some defects in proceedings relating to the identification parade, we will not be justified in rejecting the evidence of the witnesses regarding the participation of A-2.* (emphasis added).

[33] In *Malkhansingh v. State of Madya Pradesh* [2003] Cri LJ 3535 at p. 3538, BP Singh J delivering the judgment of the Indian Supreme Court said:

> 7. **It is trite to say that the substantive evidence is the evidence of identification in Court**. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. *This rule of prudence, however, is subject to exceptions, when, for example, the Court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration*. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure, which obliges the investigating agency to hold, or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. *Failure to hold a test identification parade would not make inadmissible the evidence of identification in Court. The weight to be attached to such identification should be a matter for the Courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration.* (See *Kanta Prashad v. Delhi Administration*, AIR 1958 SC 350; *Valkuntam Chandrappa and others v. State of Andhra Pradesh*, AIR 1960 SC 1340; *Budhsen and another v. State of U.P.*, AIR 1970 SC 1321 and *Rameshwar Singh v. State of Jammu and Kashmir*, (1971) 2 SCC 715. (emphasis added).

[34] In *Vaikuntam Chandrappa v. State of AP* [1960] Cri LJ 1681, Wanchoo J said:

> It is also true that the substantive evidence is the statement in court; but the purpose of test identification is to test that evidence and the safe rule is that the sworn testimony of witnesses in court as to the identity of the accused who are strangers to the witnesses, generally speaking, requires corroboration which should be in the form of an earlier identification proceeding. *There may be exception to this rule where the court is satisfied that the evidence of a particular witness is such that it can safely rely on it without the precaution of an earlier identification proceeding*. (emphasis added).

[35] So, it cannot be laid down as a rule of law that without identification parade, the evidence of a witness in a trial is not worthy of consideration. Indeed, to hold that an identification parade, must, in all circumstances, be conducted in order to sustain a conviction would be too stringent. This was made clear in the judgment of the Federal Court in *Arumugam Muthusamy v. PP* [1998] 3 CLJ 597. In that case one of the questions of law referred to the Federal Court was whether dock identification in court after a long lapse of time without holding an identification parade can be sufficient basis for a conviction. In delivering the judgment of the Federal Court, Chong Siew Fai CJ (Sabah & Sarawak) said at p. 602:

> By the term "dock identification" we take it to mean identification of an accused for the first time in court at trial. And we shall attempt to answer the question posed with that meaning of the term in mind.
>
> The question, as framed, is in general terms and lacks precise or essential facts necessary for a definite answer of "Yes" or "No". *Much depends on the precise circumstances and the stance of the defence. How long is the "long lapse"? What are the circumstances in which a witness has seen the accused eg, the distance between him and the accused, the weather condition, any lighting particularly if at night, and, if so, quality of the lighting, the length of time the witness sees or observes the accused, any conversation carried on between them, whether the witness has known or seen the accused prior to the incident, and so forth.* Facts such as those mentioned above are lacking, but they are essential for the purpose of arriving at a more definite answer to the above question referred.
>
> Generally speaking, however, a dock identification in the sense as described above ie, identification of an accused for the first time in Court at the trial, is undesirable, and it would be a good practice to hold an identification parade, which, if it turns out to be positive, would tend to strengthen the case for the prosecution. *But to hold that an identification parade must, in all circumstances, be conducted in order to sustain a conviction would be too stringent*. There may well be situations where the attendance of the witness at the parade is physically impossible or impracticable or there are exceptional circumstances.
>
> Briefly, therefore, the answer to Question (1) is: it depends on the particular facts and circumstances of each case. (emphasis added).

[36] The Federal Court found that the quality of the identification evidence in that case was good, and that although the learned Magistrate in that case did not warn herself of the terms postulated in *R v. Turnbull* [1976] 3 All ER 549, she was mindful of the fact that the two identification witnesses (PW1 and PW2) had never seen the accused prior to the incident:

> In this case there were two identification witnesses, PW1 and PW2. In point of law, an identification by one witness can constitute support for the identification by another provided that the trial magistrate

A warns himself that even a number of honest witnesses can all be mistaken. In our present case, though the trial magistrate did not warn herself in like terms, she was mindful of the fact that PW1 and PW2 had never seen the accused prior to the incident on 1 or 2 April 1986. The quality of the identification evidence was good. In the circumstances as shown by the evidence, she found it reasonable that B they could remember the accused's face, and she accepted their evidence. Furthermore, there are other evidence: the car-key in the applicant's possession at the time of his arrest; both PW4 and PW5, who effected the arrest, said they used to see the applicant driving the car; and the car was parked in front of the shop where the applicant lived. Both PW4 and PW5 were not cross-examined.

C

In the circumstances, the Federal Court upheld the conviction and sentence imposed by the learned magistrate on the accused.

[37] Similarly, in *State of Rajasthan v. Shiv Singh* [1962] (1) Cri LJ 82 at pp. 86 - 87 Bhandari J said:

D

...The main ground given in his judgment is that no identification parade was held before the magistrate for identifying the accused and that no identification test was made before a magistrate for identifying the sword. Identification proceedings are held before the magistrate to E enable the court to judge the value of the evidence of the witnesses identifying the accused or the article. There are so many factors that enter in judging the value of the evidence of a witness and identification proceedings may throw a light on the credit to be given to the evidence of the witness.

F In some cases it may be deemed essential that the evidence of a witness at the trial is of no worth as there had been no identification test before the magistrate. *Such may be the cases when the witness had a very little opportunity to identify the accused or the article. Those are cases in which the time and the manner of the commission of offence, the state of light at that time and other circumstances in the case are such that a court of law* G *may deem them to be of such consequence that the testimony of the witness at the trial may be of little avail without previous identification proceedings. Such cases are usually cases when the offence is committed in a hurried manner and at a time where there is not sufficient light*. A court of law may also consider looking to the standard of intelligence of the witnesses that their evidence cannot be much relied on without the re-assuring factor H of their identifying the accused at the test identification parade. After all, identification proceedings are meant for lending assurance to the court regarding the credibility of the evidence of a witness at the trial *but it cannot be laid down as a rule of law that without identification proceedings, the evidence of a witness at the trial is not worthy of consideration. This will be going too far and is not warranted by any rule of law*. (emphasis I added)

[38] Thus, even in a case where no identification parade is held, the court can rely on the evidence of the dock identification as sufficient basis for conviction if it is satisfied with the credibility and reliability of the witness giving the evidence of identification in court. In our view, this is where the well-known guidelines laid down in the judgment of Lord Widgery CJ in *R v. Turnbull* (*supra*), come into play. The *Turnbull* guidelines were enunciated as a result of the criticism of the existing law, under which no specific duty was imposed on judges to warn juries against the proven dangers of mistaken identification evidence (see *R v. Long* [1973] 57 Cr App R 871). The appeals in *Turnbull* raised problems relating to evidence of visual identification in criminal cases. Early in his judgment in the *Turnbull* case, Lord Widgery CJ said:

> Such evidence can bring about miscarriges of justice and has done so in a few cases in recent years. The number of such cases, although small compared with the number in which evidence of visual identification is known to be satisfactory, necessitates steps being taken by the courts, including this court, to reduce that number as far as is possible. In our judgment the danger of miscarriages of justice occurring can be much reduced if trial judges sum up to juries in the way indicated in this judgment.

[39] Commenting on the *Turnbull* guidelines, the Privy Council said in *Nembhard v. The Queen* [1981] 74 Cr App R 144:

> *Turnbull* does not purport to change the law. **It provides a most valuable analysis of the various circumstances which common sense suggest or experience has shown may affect the reliability of a witness's evidence of identification** and make it too dangerous in some of the circumstances postulated to base a conviction on such evidence unless it is supported by other evidence that points to the defendant's guilt. *Turnbull* sets out what the judgment itself described as "guidelines for trial judges" who are obliged to direct juries in such cases. (emphasis added).

[40] The *Turnbull* guidelines had been accepted in Malaysia (see *Rangapula Ramasamy & Anor v. PP* [1981] CLJ 129; [1981] CLJ (Rep) 261, *Dato' Mokhtar Hashim & Anor v. PP* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101, *Yau Heng Fang v. PP* [1985] 2 CLJ 22; [1985] CLJ (Rep) 350 and *Arumugam Muthusamy v. PP* (*supra*)). On the application of the *Turnbull* guidelines to the local cases, this court in *Tan Kim Hoo v. PP & Another Appeal* [2007] 6 CLJ 557 adopted and applied the following passage in the judgment of Karthigesu JA in *Heng Aik Ren Thomas v. Public Prosecutor* [1998] 3 SLR 465, at pp. 475 - 476:

> In adapting the *Turnbull* guidelines for our local system, we have reworked the *Turnbull* guidelines into the following three step test. The first question which a judge should ask when encountering a criminal

A case where there is identification evidence, is whether the case against the accused depends wholly or substantially on the correctness of the identification evidence which is alleged by the defence to be mistaken.

> If so, the second question should be this. Is the identification evidence of good quality, taking into account the circumstances in which the identification by the witness was made? A non-exhaustive list of factors which could be considered include the length of time that the witness observed the accused, the distance at which the observation was made, the presence of obstruction in the way of the observation, the number of times the witness had seen the accused, the frequency with which the witness saw the accused, the presence of any special reasons for the witness to remember the accused, the length of time which had elapsed between the original observation and the subsequent identification to the police and the presence of material discrepancies between the description of the accused as given by the witness and the actual appearance of the accused. In considering the circumstances in which the identification was made, the judge should take note of any specific weaknesses in the identification evidence. If after evaluation of the identification evidence, the judge is satisfied that the quality of the identification evidence is good, he may then go on to safely assess the value of the identification evidence.
>
> Where the quality of the identification evidence is poor, the judge should go on to ask the third question. Is there any other evidence which goes to support the correctness of the identification? If the judge is unable to find other supporting evidence for the identification evidence, he should then be mindful that a conviction which relies on such poor identification evidence would be unsafe. The supporting evidence need not be corroborative evidence of the kind required in *R v. Baskerville* [1916] 2 KB 658. What the supporting evidence has to be is evidence that makes the judge sure that there was no mistake in the identification.

[41] We too would adopt and apply the same passage to the present appeal in considering the vital question whether the learned trial judge had properly and adequately directed himself on identification evidence before him?.

[42] We now turn to the judgment of the learned trial judge. After setting out on the prosecution's case thereby discussing the evidence of PW9, PW10 and PW7 and the necessary elements of the offence of murder under s. 300 of the Panel Code, this is what the learned trial judge said:

> However in the instant case, the issue was not whether it was murder or some lesser offence, but who was/were the assailant/s. Given the law and facts in relation to the acts committed, it was so clear that it

was murder. The injuries, all grave and life threatening, proved the intention. Both deceased were unarmed, while their assailant/assailants were armed. None the exceptions would seem to apply.

Upon considering the evidence available to us in the Appeal Record we are satisfied that the learned trial judge was correct in arriving at the aforesaid findings. Continuing his judgment the learned trial judge said:

> **What remained was whether it proved that it was the accused who committed the act/acts that caused death of Ah Soon and Ah Leong**. It was the clear and unambiguous testimony of PW9 and PW10 that the accused were the assailant/s in question. But right from the beginning, that testimony of PW9 and PW10 was challenged by the defence who made it clear in their examination of PW9 and PW10 that the identity of the assailant/s was in issue, if not the issue. Not surprisingly, the submission of learned counsel at the close of the prosecution case was largely devoted to the identity of the assailants. Both learned counsel highlighted what they contended were inconsistencies in the testimony of PW9 and PW10. And both counsel submitted that the testimony of PW9 and PW10, particularly in relation to the identity of the assailants, must be seriously doubted if not rejected by reason of the inconsistencies in their testimony. (emphasis added).

[43] It is therefore clear that the learned trial judge was fully aware that the case against both the accused depends substantially if not wholly, on the correctness of the identification evidence of PW9 and PW10 which the defence contended was very doubtful, wholly unsatisfactory, mistaken and could not be belived at all and should be rejected. Not only was the learned trial judge aware of the issue of identification of both the accused on which he had to deliberate, he also had foremost in his mind, the attack launched by both counsel on the credibility of the evidence of PW9 and PW10, particularly on account of various inconsistencies in their evidence which both counsel had highlighted and submitted before him.

[44] Since the next point in our deliberation would inevitably centre on judicial appreciation of the evidence and credibility of witnesses, we have reminded ourselves of the approach which the trial court should adopt in considering such matters. The Privy Council has stated that the real tests for either accepting or rejecting the evidence of a witness are how consistent the story is with itself, how it stands the test of cross-examination, and how far it fits in with the rest of the evidence and the circumstances of the case (see *Bhojraj v. Sitaram* AIR 1936 PC 60). It must, however, be observed that being unshaken in cross-examination is not *per se* an all-sufficient acid test of credibility. The inherent probability or improbability of a fact in issue must be the prime

consideration (see *Muniandy & Ors v. PP* [1966] 1 LNS 110). If a witness demonstrably tells lies, his evidence must be looked upon with suspicion and treated with caution, but to say that it should be entirely rejected would be to go too far (see *Khoon Chye Hin v. PP* [1961] 1 LNS 162). Discrepancies and contradictions there will always be in a case. In considering them, what the court has to decide is whether they are of such a nature as to discredit the witness entirely and render the whole of his evidence worthless and untrustworthy (see *De Silva v. PP* [1964] 1 LNS 32). One hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries or embellishments (see *Ugar v. State of Bihar* AIR 1965 SC 277).

[45] Back to the learned judge's judgment, we find that he had critically considered the identification evidence before him. He started with the evidence of PW9. This is what the learned judge said:

> Both PW9 and PW10 were absolutely categorical and uncompromising in their identification of the accused. PW9 testified that when Ah Leong and Ah Soon were lying on the road, he saw OKT2 with a bloodstained knife. PW9 refuted all suggestion that the person who held the knife was not OKT2. PW9 testified that OKT2 with a knife in his hand warned those nearby not to intervene. PW9 testified that he could identify the person who held the knife as that person was standing still beside the body of Ah Leong. PW9 was firm that OKT2 was that person who held a bloodstained knife. **There was no waver in the testimony of PW9 that OKT2 was that person who held a bloodstained knife**. Where PW9 was diffident was with respect to the events inside the disco and the brawl at the glass door. Initially, PW9 testified that both accused and their friends broke a glass inside the disco, that both accused fought with the deceased at the glass door - "Apabila kedua OKT sampai di pintu besar, mereka bergaduh dengan orang bernama Ah Leong dan Ah Soon ... Kedua-dua OKT bergaduh dengan Ah Soon dan Ah Leong. Mereka Berlawan ... " (see pages 56 of the Notes) - and that one of the friends of the accused ran into and broke the glass door. But later, when he was cross-examined by Mr. Gobind, PW9 was not that sure of the identity of the persons who quarrelled with the deceased. PW9 could only say that it was one of the accused who ran into and broke the glass door (see page 66 of the Notes). PW9 admitted that he could not identify the persons who quarrelled inside the disco, or the persons near the guard house. PW9 was also not clear in relation to the happenings inside the disco and at the glass door. And PW9 did not witness the deadly assault. But in relation to what he saw when Ah Leong and Ah Soon were lying on the road, PW9 had no doubts that OKT2 was standing beside the body of Ah Leong and was holding that knife that he identified. PW9 said that OKT2 was standing still at that time, that the lighting was

good, and that he could clearly make out OKT2's face. In relation to the major incident that he said he witnessed, PW9 was in no doubt that OKT2 was standing beside the body of Ah Leong and was holding that knife that he identified. (emphasis added).

[46] From the above passage, it is clear to us that the learned judge found PW9's evidence on the identification of the second accused to be good. He had also directed his mind to that part in PW9's evidence where there appeared to be discrepancies. However, after subjecting it to critical evaluation, he accepted the evidence of PW9, which to our mind he was perfectly entitled to do.

[47] Next, the learned judge considered the evidence of PW10 on the identification of the first and the second accused and as to what they did at the material time, and subject it to critical scrutiny:

PW10 was also in no doubt on the identity of the assailant/assailants. PW10 testified that throughout the entire incident she was with both deceased. PW10 had seen OKT1 even before the deadly assault. She testified that inside the disco, the beer glass of Ah Leong fell and hit OKT1, that OKT1 followed them as she, Ah Leong and Ah Soon departed from the disco, that at the door of the disco OKT1 pushed Ah Leong, that there was a scuffle between OKT1 and Ah Leong, that OKT1 ran into and shattered the glass door, that OKT1 picked up a shard of glass and tried to thrust it into Ah Leong, and that OKT1 then ran away. In relation to that testimony, PW10 was not challenged (see the cross-examination from 104 to 114 of the Notes). It was only in relation to the deadly assault that it was put to PW10 that she did not see "apa yang berlaku pada Ah Leong" (see page 114 of the Notes). Otherwise, it was the unchallenged testimony of PW10 that OKT1 was at the scene of the deadly assault. To recapitulate, PW10 testified that when their car was at the front of the hotel building, OKT1 called for Ah Leong, that Ah Soon alighted from the car followed by Ah Leong, that "OKT1 ada di pintu hadapan hotel" that OKT1 walked towards Ah Soon, that "datang dari belakang OKT1 ada seorang lelaki India dan membawa pisau. Lelaki India yang membawa pisau itu adalah OKT2", that Ah Soon was in front of the car while Ah Leong was behind the car, that "OKT2 berlari menuju ke arah Ah Soon. OKT2 mencucuk Ah Soon 2 kali ... Lepas itu OKT2 terus menuju ke arah Ah Leong. OKT2 mencucuk Ah Leong 3 times" (see pages 94 – 95 of the Notes). It was the testimony of PW10 that OKT1 was at the immediate scene, and PW10 was not challenged (again, see the cross-examination from pages 104 to 114 of the Notes).

It was put to PW10 that she was inside the car and so did not see "apa yang berlaku pada Ah Leong" (see page 114 of the Notes) and that she did not see the happenings outside the car (see page 124 of the Notes). PW10 admitted that she was "tidak pasti samada batu-bata kena kepala Ah Leong" (see page 116 of the Notes). Nevertheless, it was the firm testimony of PW10, and the undoubted effect of her testimony, that OKT1 struck Ah Leong with a brick, that is, after OKT2 had first stabbed Ah Soon and then Ah Leong.

> "Saya berada di dalam kereta. OKT1 membawa batu-bata dan pecahkan cermin kereta di hadapan dan di belakang. OKT1 memecah cermin kereta selepas OKT2 cucuk Ah Soon dan Ah Leong. Saya berada di tempat duduk di belakang kereta. Saya nampak dengan jelas apa-apa yang berlaku. Lepas memecah cermin kereta, OKT1 dengan batu-bata sama menuju ke arah Ah Leong. Saya tidak pasti samada batu-bata kena Ah Leong atau tidak. Batu-bata ada dalam tangan OKT1" (see page 95 of the Notes). "Saya keluar dari kereta. Saya cuba sembunyi di tempat parking di sebelah sana. OKT1 nampak saya dan OKT1 cekik leher baju saya."

PW10 admitted that she was "tidak pasti samada batu-bata kena kepala Ah Leong" (see page 116 of the Notes). *Still, it could be easily deduced that Ah Leong would have been struck on his head with a blunt object, for Ah Leong was bodily intact just before the incident. So, who was/were the person/ persons who struck Ah Leong on his head? As said, it was established that OKT1 was at the immediate scene. It was the testimony of PW10 that OKT1 first smashed the windscreen of their car with a brick and then proceeded to Ah Leong with brick in hand - "Lepas memecah cermin kereta, OKT1 dengan batu-bata sama menuju ke arah Ah Leong. Saya tidak pasti samada batu-bata kena Ah Leong atau tidak. Batu-bata ada dalam tangan OKT1" (see page 95 of the Notes). It was the undoubted effect of that testimony, that OKT1 struck at Ah Leong with a brick.* In fact, it was the testimony of PW10 that OKT1 struck at Ah Leong with a brick. PW10 was only not sure if the brick actually struck Ah Leong (see 115 – 116 of the Notes). But there was no doubt that the head of Ah Leong would have been struck with a blunt object. (emphasis added).

[48] The learned judge's scrutiny of PW10's evidence did not end there. He said:

> It was not lost that PW10 was the only witness of the crucial alleged fact that OKT2 first stabbed Ah Soon and then Ah Leong, and that thereafter OKT1 struck Ah Leong with a brick. But PW10 was a witness who was found to be most accurate in her observation. PW10 was a witness who was corroborated on all material aspects, where she could be corroborated, by the established evidence. Her evidence that Ah Soon was in front of the car while Ah Leong was behind the car when they were stabbed was corroborated by the positions of the bodies of Ah Soon and Ah Leong after the deadly assault (see sketch plan). Her evidence that Ah Soon was stabbed 2 times while Ah Leong was stabbed 3 times was corroborated by the number of stab injuries found by the government pathologist (PW7). Her ability to relate the numbers of blows, which is something beyond most witnesses, proved she was most observant. Her evidence that the windscreen was smashed was corroborated by the pictures of the car at the scene. Given that the evidence of PW10 was corroborated by all silent evidence, it would not seem that PW10 could not or did not see the happenings outside the car.

[49] Thus, he had tested PW10's evidence with other evidence, and in the process he found corroboration for PW10's evidence. For our part, in the context of corroboration, having considered the whole of the evidence available to us, we find that PW10's evidence that the second accused was the person who stabbed Ah Leong and Ah Soon was corroborated by PW9's evidence when he testified steadfastly that when he came out of the disco again, he saw Ah Leong and Ah Soon lying on the road in front of the disco, and that as he and another captain of the disco was about to move closer to Ah Leong and Ah Soon, he saw the second accused holding a knife and heard the latter threatening, "Siapa nak campur, saya akan cucuk". As we adverted to earlier, learned counsel for the first accused had singled out this vital evidence of PW9 to support his contention that the vital event revealed in the aforesaid evidence of PW9 was surprisingly missing from PW10's evidence. Learned counsel then contended that was a very material omission in PW10's evidence, creating very serious doubt on the credibility of PW10 who claimed to have witnessed the whole incident. He complained that this omission was not considered by the learned judge and thus seriously misdirecting himself. The absence in PW10's evidence of the event about the second accused holding a knife and threatening PW9 and another captain does not necessarily mean that PW10's credibility had diminished. On the contrary, it is an indication that PW10's evidence has the ring of truth because as said by Raja Azlan Shah FJ (as His Royal Highness then was) in *PP v. Datuk Haji Harun Haji Idris (No 2)* [1976] 1 LNS 97; [1977] 1 MLJ 15, at p. 19:

> ... In my opinion discrepancies there will always be, because in the circumstances in which the events happened, every witness does not remember the same thing and he does not remember accurately every single thing that happened. It may be open to criticism, or it might be better if they took down a note book and wrote down every single thing that happened and every single thing that was said. But they did not know that they are going to be witnesses at the trial. I shall be almost inclined to think that if there are no discrepancies, it might be suggested that they have concocted their accounts of what had happened or what had been said because their versions are too consistent.

[50] To us, the event about the second accused holding a knife and threatening "siapa nak campur saya akan cucuk" (as revealed in PW9's evidence referred to earlier) happened after the stabbing of Ah Leong and Ah Soon as narrated by PW10 in her testimony. That evidence by

PW9 that the second accused was seen holding a knife and threatening PW9 and another person that he would stab anyone who tried to interfere was too our mind, very valuable, and when thrown into the scale it lend credence to PW10's evidence that it was the second accused who had earlier on stabbed Ah Leong and Ah Soon.

[51] Eventually, the learned judge found the quality of PW10's identification evidence to be good as laid down in the *Turnbull* guidelines. This is what he said:

> In addition, the quality of PW10's identification of OKT1 should be considered good under the guidelines laid down in *R v. Turnbull* [1977] QB 224, which are as follows:
>
> (a) First, whenever the case against the accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct the jury as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words. ...
>
> (b) Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example, by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?
>
> (c) Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence.

Saying that the aforesaid matters go to the quality of the identification evidence, Lord Widgery CJ at pages 552 - 554 further said:

> If the quality is good and remains good at the end of the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment, when the quality is good, as for example when the identification is made after a long period of observation, or

in satisfactory conditions, by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however, that an adequate warning has been given about the special need for caution ...

When, in the judgment of the trial Judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The Judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification. This may be corroboration in the sense lawyers use that word; but it need not be so if its effect is to make the jury sure that there has been no mistaken identification ...

The trial judge should identify to the jury the evidence which he adjudges is capable of supporting the evidence of identification. If there is any evidence or circumstance which the jury might think was supporting when it did not have this quality, the judge should say so. A jury, for example, might think that support for identification evidence could be found in the fact that the accused had not given evidence before them. An accused's absence from the witness box cannot provide evidence of anything and the judge should tell the jury so. But he would be entitled to tell them that when assessing the quality of the identification evidence they could take into consideration the fact that it was uncontradicted by any evidence coming from the accused.

...

A failure to follow these guidelines is likely to result in a conviction being quashed and will do so if in the judgment of this court on all the evidence the verdict is either unsatisfactory or unsafe...

[52] He then went meticulously into the reasons why he found PW10's evidence on the identification of first accused to be of good quality and that there was no danger of wrong identification by her:

The circumstance in which the identification of OKT1 came to be made could hardly by better. First, PW10 had seen OKT1 inside the disco. Then, the incidents inside the disco and at the glass door were special reasons for PW10 to remember OKT1. And most notably of all, OKT1 would have been right under or above the nose of PW10, and literally just a breath away from PW10 at about time just immediately after the deadly assault. The following was the testimony of PW10 from the point when she said she got out from the car to hide at the car park on the right of the car.

A Saya tidak pasti samada batu-bata kena Ah Leong atau tidak. Batu-bata ada dalam tangan OKT1" "Saya keluar dari kereta. Saya cuba sembunyi di tempat parking di sebelah sana. OKT1 nampak saya dan OKT1 cekik leher baju saya. Lepas itu, OKT1 tengok ke belakang dan tangan kanannya macam hendak meminta sesuatu. Saya cakap kepada OKT1 saya perempuan
B dan tidak terlibat. OKT1 tarik dan tolak saya. Butang ketiga saya terputus. OKT1 beredar. Saya tidak tahu OKT1 berlari ke mana" (see page 95 of the Notes).

At that distance when she was held by the scruff of her neck, PW10 would have had a full and unimpeded and most close look at the
C person who held her. OKT1 would have been right in front of PW10. So, PW10 had OKT1 under most close observation. PW10 pleaded with OKT1 to free her. So, PW10 would have had time to register the features of OKT1. It could only be said that in relation to OKT1, the quality of the identification evidence of PW10 was very good. There was no danger of wrong identification by PW10 who incidentally, had
D at identification parades held on 26.4.1999, identified OKT1 "sebagai orang yang pecahkan cermin kereta dan memukul kepala mangsa dan cekik baju saya", and OKT2 "sebagai orang yang menikam kedua-dua mangsa" (see page 102 of the Notes).

E **[53]** The learned judge also explained the reasons as to why he considered the evidence of the identification of the second accused to be of good quality:

The circumstances in which the identification of OKT2 came to be made were also good. PW10 was 8 feet away when OKT2 stabbed Ah
F Soon, and 5 feet away when OKT2 stabbed Ah Leong. "Keadaan cahaya ada terang. Saya boleh nampak dengan jelas. Ada spotlight" (see page 96 of the Notes). And as said, PW10 was a witness who could be relied on. The other witness who identified OKT2 was also close to OKT2. PW9 was close enough to OKT2 to be able to see and testify that the knife was about 6 inches long and had blood on
G the blade. According to PW9, there were spotlights at the front of the hotel and fluorescent lights by the side of the hotel and disco, spherical lights on the boundary wall, and that it was bright at that time. It was the firm testimony of PW9 that his view of OKT2 was not obstructed, and that it was bright enough to see and make out the face of OKT2. And according to PW9, he could identify OKT2, as OKT2 was
H standing still beside the body of Ah Leong. All things considered, it could only seem that the quality of the identifying evidence was good. One bit of evidence affirmed that PW9 was also an observant witness. Just as described by PW9, the length of the blade was indeed about 6 inches.

I 2 witnesses impeccably identified OKT2 as the person with the knife. There was no reason to reject the identification of OKT2. There was also no reason to believe that the identification of OKT1 was incorrect. If at all it is necessary to add, the established evidence would not refute the correctness of the identification - the knife was recovered from a

car which ignition key was recovered from OKT2 (the arresting officer, PW13, recovered the ignition key from OKT2) while OKT1 was at the immediate scene of the deadly assault. There was no doubt that OKT1 and OKT2 were the persons and only persons who carried out the deadly assault.

[54] From what we have demonstrated thus for, we found that the learned judge had examined closely the circumstances in which the identification of the first and the second accused came to be made by PW10. He had similarly examined the circumstances in which the identification of the second accused was made by PW9. He examined how long PW10 had observed the first and the second accused, and how long PW9 had observed the second accused. At what distance? In what lighting condition? And whether the observation was impeded in any way?. On careful scrutiny of the whole evidence, it is clear to us that this is not a case of fleeting glance or unclear or partial observation or observation in poor lighting condition.

[55] In the case of PW10, she was present in the whole incident witnessing the event in the disco, outside the door of the disco and more importantly the slaying of Ah Leong and Ah Soon which took place outside the hotel, at the parking area. Not only did she have sufficiently long period to observe what was done by the first and the second accused only a few feet from her in good lighting condition, she also had come face to face with the first accused when the latter held the collar of her dress. All this would surely have left a lasting impression and clear imprint in her mind about the unexpected turn of events which had resulted in the deaths of Ah Leong and Ah Soon. In this regard we have not lost sight of the contention by learned counsel for the first accused that being in the car at the material time and being scared and with her head bent downwards, she could have not have witnessed the alleged assault by the first accused on Ah Leong's head, outside the car, at the rear. To reinforce the point submitted, learned counsel had referred us to that part of PW10's evidence in cross-examination which ran as follows:

Saksi : Lepas itu dia pergi ke tempat Ah Leong di belakang kereta.

D/C : Apa berlaku di sana.

Saksi : Dia tikam Ah Leong.

D/C : Dia tikam Ah Leong di tempat awam.

Saksi : Tempat "N" di tempat sebelah kiri belakang kereta.

D/C : Saya katakan kamu tidak dapat kedua-dua kejadian kepada kedua-dua si mati sebab kamu telah tunduk dan kepala kamu adalah ke arah kanan.

Saksi : Tidak setuju.

D/C : Saya katakan pandangan kamu dihalang oleh kedua-dua tempat duduk pemandu dan penumpang.

Saksi : Tidak setuju.

D/C : Saya katakan pandangan kamu dihalang oleh bahagian kiri hadapan kereta semasa kamu tunduk.

Saksi : Setuju.

D/C : Saya katakan pandangan kamu ke belakang juga dihalang oleh tempat duduk belakang.

Saksi : Setuju.

D/C : Pandangan kamu ke belakang kiri ke atas juga dihalang oleh tempat duduk belakang.

Saksi : Setuju.

[56] Upon considering the whole of PW10's evidence we do not think that any reasonable doubt had been created in PW10's evidence. We found that she remained steadfast on her account of the stabbing and she remained unscathed at the end of her evidence, for, in re-examination PW10 said:

Saya pasti dengan sesiapa yang tikam sebab saya melihat dia.

Saya melihat orang itu dengan jelas. Saya ada masa lebih kurang 15 minit untuk melihat mereka orang yang tikam. OKT2 yang tikam.

Pada malam itu keadaan ada cahaya dan terang. Selain daripada spot light yang ditunjuk dalam P19(1) juga ada lain-lain spot light. Spot light itu adalah P2 di ID25.

Tidak benar Ah Leong ada membawa senjata. Walaupun saya tunduk di belakang kereta, saya bukan tunduk sepanjang masa. Saya ada bangun dan dapat lihat apa yang berlaku di belakang. Bonet kereta menghalang pandangan saya.

Saya melihat OKT dengan batu macam menghentak.

[57] We also considered the various discrepancies in and between the evidence of PW9 and PW10 which both counsel had taken us through with a fine tooth comb in their oral and written submissions. However, we are not convinced that the discrepancies were of such nature as to

destroy the credibility of their evidence. In this regard, on discrepancies in Sarkar, the *Law of Evidence*, 16th edn. 2007, at p. 140, the learned author said: A

> Discrepancies do not necessarily demolish testimony (*Narotam v. SA* [1978] SC 1542). Minor contradictions in the prosecution story are bound to occur which are spontaneous and natural. This, however, does not weaken or debilitate the prosecution case. (*Kushal @ Dhruba Ray v. State of West Bengal*, [2001] (3) CHN 407 (Cal)). Where the entire incident took place hardly in 4 or 5 minutes and it is possible that injured person may not have seen every thing or may have made mistake relating to sequence of events, it would not be proper to discard the evidence of eye-witnesses on its entirety. (*Babu Raosaheb Navale v. State of Maharashtra*, [2004] (2) Bom CR (Cri) 730). Discrepancies in the testimony of various witnesses on material or broad points have to be carefully weighed in arriving at the truth. But trifling discrepancies should be ignored, as they are often a test of truth. Several persons giving their versions of a transaction witnessed by them are naturally liable to disagree on immaterial points. Their powers of observation, expression or memory are not the same and honest differences are easily possible. It must be remembered that there are discrepancies of truth as well as falsehood. It is the broad facts of a case and not the little details that are to be considered in weighing evidence. PALEY said: "I know not, a more rash or unphilosophical conduct of the understanding than to reject the substance of a story by reason of some diversity in the circumstances with which it is related. The usual character of human testimony is substantial truth under circumstantial variety. This is what the daily experience of courts of justice teaches. When accounts of transaction come from the mouths of different witnesses, it is seldom that it is not possible to pick out apparent or real inconsistencies between them. These inconsistencies are studiously displayed by an adverse pleader, but often times with little impression upon the minds of the judges. B C D E F

[58] Identity is a question of fact which turns on credibility of witnesses. On the matter of credibility, we must defer to the views of the learned trial judge, especially where as in this case, he had given convincing reasons for accepting the evidence of PW9 and PW10. The true or false note is generally more audible to the judge who hears and sees the witnesses than to the appellate court reading the record (per Lord Hoffman in *Ryan v. Jarvis* [2005] UPKC 27). In *Andy Bagindah v. PP* [2000] 3 CLJ 289, Shaik Daud JCA in delivering the judgment of this court said: G H

> There is no dearth of authorities to say that in every case, there are bound to be contradictions and discrepancies. The question to be decided by the trial judge is whether those contradictions and/or discrepancies are material ones so as to strike at the very root of the charge. It is for the trial judge to consider this since he was the one I

A who saw and heard the evidence. In the present case the learned judge concluded that there were discrepancies but those discrepancies were not material ones. Since this involved the credibility of witnesses, we held that the learned judge was a better person to decide and an appellate court ought not to interfere with such findings.

B **[59]** In *Dato Mokhtar Hashim & Anor v. PP* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 at p. 113, Abdoolcader FJ when delivering the judgment of the Federal Court said:

C The Privy Council said in *Caldeira v. Gray* that the functions of an appellate court, when dealing with a question of fact, and a question of fact in which questions of credibility are involved, are limited in their character and scope, and that in an appeal from a decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, an appellate court must in order to reverse, not merely entertain doubts whether the decision below is right but be convinced that it is wrong.

D

[60] So too here. The learned trial judge was in a better and more advantageous position than us in matters which depend on credibility of witnesses. Having carefully considered the evidence in the Appeal Record ourselves, we are not convinced that he was wrong. We therefore affirm E his findings of fact on the identities of the first and second accused and in respect of what each of them did in the murders in this case.

[61] Learned counsel for the first accused also complained that the learned trial judge had failed to consider the possibility of PW10's F evidence being tainted because Ah Leong was her boyfriend and Ah Soon was her friend. We do not think there is any merit in that complaint. In our view, even if the fact that Ah Leong and Ah Soon were her boyfriend and friend respectively had made PW10 an interested witness, there is no legal presumption that her evidence should not be believed, unless there are cogent reasons to disbelieve her in the light G of the evidence to the contrary and the surrounding circumstances (see *Balasingham v. PP* [1959] 1 LNS 8). We find that in considering the evidence of PW10, the learned trial judge was fully alive to the fact that Ah Leong was her boyfriend and Ah Soon was her friend. This is clear from his judgment (see pp. 8 - 9 of the Appeal Record vol. 1). We are H satisfied that the learned trial judge had made maximum evaluation of PW10's evidence and subjected it to the tests necessary for evaluation of credibility before accepting her evidence. We cannot find fault with the approach adopted by the learned judge.

I **[62]** We move on to consider the submission of learned counsel for the first accused arising from PW7's evidence under cross-examination that, "the head injuries to both deceased were caused by a blunt object. It would have been caused by a fall." The complaint here is that the

learned judge completely overlooked that evidence and hence the possibility of the head injuries being caused by a fall. Reinforcing his submission, learned counsel also contended that when PW7 was giving evidence, the prosecution should have shown the brick to PW7 and asked him whether the brick could have caused Ah Leong's injuries. This, he pointed out, the prosecution did not do, resulting in fatal consequence to its case. He cited *Mohinder Singh v. the State* [1953] Cri LJ 1761 and *Bhagoji v. Hyderabad Government* [1954] Cri LJ 1378. We do not think that the failure in the nature complained of by learned counsel necessarily attracts fatal consequences. It depends on the facts and circumstances of each case. In the instant appeals, we do not think that such a failure had resulted in the fatal consequence contended by learned counsel. In our view, on the facts, the two cases cited by learned counsel can be distinguished. Unlike the present case, in *Mohinder Singh*'s case the court was doubtful whether the injuries which were attributed to the appellant were caused by a gun or by a rifle. The court found that indeed it seemed more likely the injuries were caused by a rifle than by a gun, and yet the case for the prosecution was that the appellant was armed with a gun and, in his examination, it was definitely put to him that he was armed with the gun P16. Hence the court held that it was only by the evidence of a duly qualified expert that it could have been ascertained whether the injuries attributed to the appellant were caused by a gun or a rifle and such evidence alone could settle the controversy as to whether they could possibly have been caused by a fire arm being used as such at close range as is suggested in the evidence. In *Bhagoji*'s case, there was no eye witness to the murder and the case against Bhagoji and one Rabhaji rested solely on circumstantial evidence. In the present appeals there was an eye witness to the attack on Ah Leong and Ah Soon. That eye witness's evidence was corroborated by the evidence of PW9 and PW7, the pathologist.

[63] In a latter case of *Prem Chand v. The State* [1996] Cri LJ 1217, one of the complaints made by learned counsel for the accused was that the medical officer was not shown the weapon recovered in this case and his opinion as to whether the injuries found on the dead body were possible by the said weapon was not obtained and therefore, the prosecution case should not be accepted. The court held that when the victims were stabbed to death by four persons, the injuries, as per medical witness opinion, were *ante mortem* and caused by sharp edged weapons, and the evidence of the eye-witnesses corroborated the prosecution story, the failure of the prosecution to seek medical experts opinion with regard to particular weapons used was not fatal to the prosecution. In *State of UP v. Krishna Gopal*, AIR, 1988, 2154, the respondents were charged with murder in furtherance of common intention under s. 34 of the Penal Code. The learned Sessions Judge

convicted the respondents. On appeal, the High Court, acquitted the respondents. The acquittals were challenged by the state by a special leave. In delivering the judgment of the Supreme Court, Venkatachaliah J said at p. 2160:

> There might also be some justification for the grievance of the appellant that the High Court had preferred some observations in the medical evidence - which Sri Prithviraj characterised as merely conjectural answers - to the other categoric answers by the very medical witnesses themselves. Sri Prithviraj also submitted that it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eye-witnesses' account which had to be tested independently and not treated as the "variable" keeping the medical evidence as the "constant".
>
> *It is trite that where the eye-witnesses' account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bantham said, are the eyes and ears of justice.* Hence the importance and primacy of the quality of the trial process. Eye witnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touch-stone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be credit-worthy; consistency with the undisputed facts the 'credit' of the witnesses; their performance in the witness-box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation. (emphasis added).

[64] In *Chimanbhai Ukabhai v. State of Gujarat* AIR 1983 Supreme Court 484, at p. 487, Misra J when delivering the judgment of the Supreme Court said:

> Ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eye witnesses. Unless, however the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eye witnesses, the testimony of the eye witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence.

[65] In that case, the Supreme Court held that the main ground on which the evidence of the eye witnesses was discarded by the Sessions Judge was that the medical evidence belied the prosecution case. The High Court on appeal came to the conclusion that all the eye-witnesses were possible witnesses and their presence was quite natural.

The High Court was, therefore, fully justified in coming to the conclusion that medical evidence did not belie the prosecution case, rather it was in support of the prosecution case and the reversal of the order of acquittal was proper.

[66] In the instant appeals, from the evidence of PW10 which he had accepted, the learned trial judge made the finding of fact that the first accused struck Ah Leong with a brick. This is supported by PW7's evidence that he found a crack fracture 7cm horizontal on the left parietal bone of Ah Leong, which corresponded at the middle meningeal artery commencement and extended into the left anterior fossa. The left orbital roof was also fractured 5cm. The right orbital ridge was depressed and crossed the midline and breached both anterior fossae. The brain was mildly swollen and oedimatous. There was generalised subarachnoid haemorrhages especially thick on the left side. There were also focal contusions on the under surfaces of both frontal lobes. As would be recalled, PW7 said the deceased died because of the chest and the head injuries. PW7's opined that the head injuries were caused by something blunt. In our view, in the light of the totality of the evidence as aforesaid, it is not in least probable that the fracture on Ah Leong's head had been caused by a fall.

[67] The other point raised on behalf of the first accused concerned three friends of the second accused, who, according to SP9 were squatting in the guard post, at the time when SP9 saw the second accused holding a knife. Learned counsel submitted that none of the three friends of the second accused was called by the prosecution and this he contended had raised adverse inference under s. 114(g) of the Evidence Act 1950. Learned counsel for the second accused also submitted on adverse inference under that section in relation to the prosecution's failure to call Cheo Yew Choy and Ng Lian Huat to give evidence. According to the evidence of PW17, in the identification parade conducted by him, other than PW9, Chew Yew Choy and Ng Lian Huat also identified the second accused. In his evidence, PW9 had identified Ng Lian Huat as the other captain who was with him when he saw the second accused holding a knife and threatening that he would stab anyone who tried to interfere. Learned counsel for the second accused contended the prosecution's failure to call these two witnesses raised adverse interfere under s. 114(g) of the Evidence Act 1950. We are unable to agree. Firstly, we need to reiterate that adverse inference under that section can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence (see *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 (SC), *Mohd Shamshir Md Rasid v. PP* [2009] 6 CLJ 208, FC). In the instant appeals we find no such withholding or suppression of evidence. We find that the prosecution had adduced evidence to show various attempts to serve subpoenas for the various

hearing dates on the accused friends, namely Sivakumar a/l Arumugam, Shankar a/l Kamppaiah, Santi a/p Subramaniam and Jivakumar a/l Shanmugam, as well as the other witnesses, namely Cheo Yew Choy, Ng Lian Huat, Fang Teck Meng and Ng Choon Huat. All these attempts prove futile as those witnesses could not be found at their available addresses. Evidence was also adduced to show efforts by the police to locate those witnesses by various advertisements in Tamil Nesan, Malaysia Nanban, Sin Chew Daily, China Press, Nanyang Siang Pau and Harian Metro. None of these efforts proved fruitful. Secondly, it is well settled that in a criminal case, the prosecution, provided that there is no wrong motive, has a discretion as to what witnesses should be called by it (see *Khoon Chye Hin v. PP* [1961] 1 LNS 41, HC, *Adel Muhamed El Dabah v. Attoney General of Palestine* [1944] AC 168, *PP v. Dato' Seri Anwar Ibrahim (No. 3)* [1999] 2 CLJ 215). However, that prosecutorial discretion must be subject to the most basic limitation that it has to produce all the necessary evidence to prove the case against the accused beyond reasonable doubt (see *Abdullah Zawawi Omar v. PP* [1985] 2 CLJ 2; [1985] CLJ (Rep) 19; [1985] 1 MLJ 16, at 19, (SC)]. Thus, in *Teoh Hoe Chye v. PP & Another Case* [1987] 1 CLJ 471; [1987] CLJ (Rep) 386, Abdul Hamid CJ (Malaya) (as he then was) said at p. 229:

> Nevertheless, the decision whether to call or not to call a witness including a witness from whom a statement has been taken is always the right of the prosecution (*Abdullah Zawawi Omar v. Public Prosecutor*). Insofar as the trial Court is concerned, its duty is essentially to decide whether on the evidence before it the prosecution has proved its case, and if there are unsatisfactory features in the prosecution case to determine whether, in the light of such features, the prosecution case fell short of proof beyond reasonable doubt (*Abdullah Zawawi Omar*'s case, *supra*).

[68] In the instant appeals, we find no such unsatisfactory features. Indeed, as is clear in this judgment, we are satisfied that the learned trial judge was right when he held that "at the end of the prosecution case, it was found that the prosecution had made out a *prima facie* case against both accused in respect of the 1st charge, and a *prima facie* case against OKT2 in respect of the 2nd charge to be read without the allegation of common intention. At the end of the entire case, it was found that both accused had not raised any reasonable doubt on their guilt which was proved beyond all reasonable doubt."

[69] On the question of common intention, learned counsel for the first accused contended that the learned trial judge was wrong when he held that the first accused had the common intention to kill. Referring to the judgment of learned trial judge, he pointed out that even after the stabbing of Ah Soon and Ah Leong, the learned judge found no evidence that the first accused shared any common design. Learned counsel

submitted that the first accused had given evidence under oath and that his defence might be true. He prayed that the first accused be acquitted of the first charge. Alternatively, he urged us to consider returning a verdict of guilty only of an offence under s. 304(b) of the Penal Code.

[70] The learned trial judge had referred to various familiar authorities on s. 34 of the Penal Code including the decision of this court in *Sabarudin Non v. PP & Other Appeals* [2005] 1 CLJ 466. In that case this court recognised the need to interpret s. 34 having regard to modern technological advances. In delivering the judgment of the court, Gopal Sri Ram JCA said at pp. 51 - 52:

> The main point made and emphasised by both learned counsel for the fourth and fifth accused is that there must be presence and participation for s. 34 to bite. They argue that since neither of their clients was present at either the scene of the abduction nor at the place where the deceased was done unto death, nor at the scene where her body was cast into the ravine s. 34 has no application to the fourth and fifth accused. With respect, as a matter of law, we are unable to agree with this submission. In our judgment, presence in every case is not necessary for s. 34 to apply. In our judgment, s. 34 should be interpreted having regard to modern technological advances. The early decisions on the section, admittedly by the Privy Council, that held presence to be essential for s. 34 to bite were handed down at a time when modes of communication were not as advanced as today. It would, in our judgment, be a perversion of justice if we are required to cling on to an interpretation of the section made at a time when science was at a very early stage of development. We find support for our view from the judgment of Thomas J in *Suresh v. State of Uttar Pradesh*, where his lordship said:
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> Even the concept of presence of the co-accused at the scene is not a necessary requirement to attract s. 34, eg the co-accused can remain a little away and supply weapons to the participating accused either by throwing or by catapulting them so that the participating accused can inflict injuries on the targeted person. Another illustration, with advancement of electronic equipment can be etched like this: One of such persons in furtherance of the common intention, overseeing the actions from a distance through binoculars can give instructions to the other accused through mobile phones as to how effectively the common intention can be implemented. We do not find any reason why s. 34 cannot apply in the case of those two persons indicated in the illustrations.
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> Thus to attract s. 34 IPC two postulates are indispensable: (1) the criminal act (consisting of a series of acts) should have been done, not by one person, but more than one person; (2) doing of every such individual act cumulatively resulting in the commission of criminal offence should have been in furtherance of the common intention of all such persons.

A Looking at the first postulate pointed out above, the accused who is to be fastened with liability on the strength of s. 34 IPC *should have done some act which has nexus with the offence. Such act need not be very substantial, it is enough that the act is only for guarding the scene for facilitating the crime. The act need not necessarily be overt, even if it is only a covert act it is enough, provided such a covert act is proved to have been* B *done by the co-accused in furtherance of the common intention. Even an omission can, in certain circumstances, amount to an act. This is the purport of s. 32 IPC. So the act mentioned in s. 34 IPC need not be an overt act, even an illegal omission to do a certain act in a certain situation can amount to an act, eg a co-accused, standing near the victim face to face saw an armed assailant nearing the victim from behind with a weapon to inflict a blow.* C *The co-accused, who could have alerted the victim to move away to escape from the onslaught deliberately refrained from doing so with the idea that the blow should fall on the victim.* Such omission can also be termed as an act in a given situation. Hence an act, whether overt or covert, is indispensable to be done by a co-accused to be fastened with the liability under the section. (emphasis added). D

[71] In the present appeal, in his judgment the learned judge said:

Would those circumstances and facts and acts permit a reasonable inference that both criminal acts were done in furtherance of the common intention, be it formed previously or on a spur of moment, E of both accused? The crucial fact was that OKT2 had come out from behind OKT1. There was no evidence that OKT1 was armed at that time. When OKT2 came out from behind OKT1, there was no evidence that OKT1 could see or saw that OKT2 was armed, or evidence to infer that OKT1 knew that OKT2 was armed and or F would commit a deadly assault, be it on Ah Soon or Ah Leong. If both accused were involved in the quarrel inside the disco and or fight at the glass door, then perhaps it could be inferred that both accused could then have developed a common malevolent design. But in absence of that evidence, there was no material to infer that OKT1 knew when he was at the front door of the hotel that OKT2 was G armed and or would carry out a deadly assault on Ah Soon and or Ah Leong. The evidence was that OKT2 first reached and stabbed Ah Soon who was in front of the car and then stabbed Ah Leong who was at the back of the car. Both accused were facing the car, and OKT1 would have witnessed the deadly assault by OKT2. As said, when OKT1 was at the front door of the hotel and when OKT2 came H out from behind OKT1, there was no evidence that OKT1 knew that OKT2 was armed and or would carry out a deadly assault on Ah Soon and or Ah Leong. For that reason, it could not be inferred that OKT1 then shared the intention of OKT2. *But when OKT2 had struck down Ah Soon and Ah Leong, OKT1 should know then that OKT2 was armed and had committed a deadly assault. Up till that point, there was still no evidence that* I *OKT1 shared any common design. But OKT1 then followed up with his own deadly attack. The evidence was that "OKT1 memecah cermin kereta selepas OKT2 cucuk Ah Soon dan Ah Leong … Lepas memecah cermin kereta,*

OKT1 dengan batu-bata sama menuju ke arah Ah Leong. Saya tidak pasti samada batu-bata kena Ah Leong atau tidak. Batu-bata ada dalam tangan OKT1" (see page 95 of the Notes). By his overt act in carrying out his own deadly assault on Ah Leong, OKT1 revealed that he shared the intention to assault Ah Leong. It could not be looked at or inferred otherwise. On the facts and circumstances of the case, it was proved, albeit by inference, that the deadly assault on Ah Leong was carried out in furtherance of the intention of both accused. (emphasis added).

[72] In the light of the proposition in *Sabarudin Non v. PP & Other Appeals* (*supra*), we cannot see how the learned judge can be faulted in his finding as such. Common intention can be formed in the course of occurrence and on a spur of moment. On the evidence in this case, far from taking action to dissociate himself from the assault, the first accused had deliberately participated on the assault on Ah Leong by carrying his own attack on the latter. In our judgment that attack by the first accused on Ah Leong was carried out in furtherance of the common intention of both accused. We therefore uphold the finding of common intention made by the learned judge.

[73] On the defence of the first accused, as is evident from his judgment, the learned judge had dealt at length with evidence given by the former. We will not repeat it. Suffice to say that eventually he found that the evidence of the first accused infact substantially corroborated the evidence of PW10 on what happened in the disco, outside the disco, at the glass door and at the parking area in front of the hotel, as well as on what was done at those places by the first accused. The only material aspect of what was done by the first accused as testified by PW10 which does not tally with the evidence given by the first accused is the nature of the assault on Ah Leong. The first accused said he only kicked and punched Ah Leong, whereas, from PW10's evidence the inevitable conclusion is that the first accused had struck Ah Leong's head with a brick. The learned judge had considered this when he assessed the whole of the first accused's evidence, and he had cogently explained why he found that at the end of the case no reasonable doubt was created. We are in agreement with him. We wish to add this. In his evidence, the first accused claimed that when he left the left area to look for Shanker, he saw the two persons who had beaten him up earlier outside the hotel porch and they asked him "tadi yang awak kena belasah tak cukupkah" and then moved closer to him. Suddenly, an Indian male emerged from behind him and stabbed both the deceased and then ran away, but the first accused said that Indian male was not the second accused. Throughout his evidence, the first accused did not identify who Indian male was. If it true that that Indian male was not the second accused and that the first accused did not know that Indian male, the incident which happened infront of him would surely be

A sufficient to terrify him. But the first accused did not appear to be scared at all, and surprisingly, he did not run away. He waited at the scene for about 10 - 15 minutes, after which he said he took a stone and threw it at the screen of the car. He said he did so because he was beaten up by the two Chinese males and he was angry and he panicked. He then
B went to the rear of the car and found a male Chinese lying there. He kicked and punched the latter two or three times. After that he saw a Malay woman (PW10) appearing from the side of the car and he grabbed and scolded her. The combination of the reaction, acts and omission of the first accused as aforesaid is not consistent at all with the
C conduct of a person who happened to be at the scene by chance, was scared and who panicked. To us, it is a manifestation of the conduct of a person who was the master and very much in control of his deliberate actions.

[74] On behalf of the second accused, learned counsel argued that the
D second accused's defence was not an alibi, but a denial, and hence he contended that the learned judge should have considered and accepted the evidence of the second accused. This brings us to the distinction between an alibi and a bare denial. Section 402A (1) of the Criminal Procedure Code does not define the words "evidence in support thereof"
E (ie, evidence in support of the defence of alibi). However, the Federal Court had decided that their meaning cannot differ from that assigned by s. 11(8) of the English Criminal Justice Act 1967. (see *Hussin Sillit v. PP* [1988] 2 CLJ 9; [1988] 1 CLJ (Rep) 128 and *Ku Lip See v. PP* [1981] 1 LNS 155). In *Ku Lip See v. PP* (*supra*), Abdul Hamid FJ (as
F His Lordship then was), speaking for the Federal Court said at p. 196:

> If a trial court having considered the evidence put forward by the defence holds that such evidence amounts to evidence in support of an alibi for which no notice under section 402A Criminal Procedure Code has been given, then he has no discretion in the matter but to
G exclude such evidence. In this respect we agree that a distinction can be drawn between the provisions in our Criminal Procedure Code and section 11(1) of the English Criminal Justice Act 1967. It is nonetheless significant to note that section 11(8) of the Criminal Justice Act defines "evidence in support of an alibi" to mean "evidence tending to show that by reason of the presence of the defendant at a
H particular place or in a particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission," whereas our section 402A does not so define but merely provides that "where in any criminal trial the accused seeks to put forward a defence of alibi, evidence in support thereof". The meaning of the words
I "evidence in support thereof" under section 402A(1) cannot, in our view, be said to differ from that assigned by section 11(8) of the English Act.

A determination whether particular evidence is evidence in support of alibi entails a consideration whether the evidence shows or tends to show that by reason of the presence of the accused at some particular place or area at a particular time he cannot be or is unlikely to be at the place where the offence is committed. It is difficult if not impossible to envisage with reference to a particular charge what evidence amounts or does not amount to evidence in support of a defence of alibi. It depends very much on the facts of each particular case. It has been described that "What is ordinarily meant by an alibi is that the accused's presence elsewhere is essentially inconsistent with his presence at the time and place alleged, and therefore with participation in the crime. An alibi may absolutely preclude the possibility of presence at the alleged time and place of the act; or the alibi may not involve absolute impossibility, but only high improbability and yet be convincing." (see *Criminal Law Review* 1978 pp. 277-8 and also on p. 278 where it is further stated that "a true alibi defence consists of a affirmative proof of the defendant's presence somewhere other than at the time and place alleged.").

[75] Then, in *Vasan Singh v. PP* [1989] 2 CLJ 402; [1989] 1 CLJ (Rep) 166, the Federal explained the difference between an alibi and a bare denial:

There is certainly now abundant authority that if witnesses are to be called in support of an alibi defence, then the requirements of a pre-trial notice must be complied with - strictly. What then is the position where the accused himself is the only witness to the alibi. It is obvious, however, that an alibi defence will not be a simple statement of: "I did not do it. I was not there. I was elsewhere." That would be evidence of a bare denial. To establish his alibi, the accused must disclose where he was at the time of the alleged offence and what he was doing. He could be travelling at the time and the only evidence he has is a ticket or an endorsement on his passport or, as here, he was in bed. That would be evidence in support of his alibi. The question is whether the words seek to put forward in s. 402A(1) include the case where the accused himself gives evidence. An accused who gives evidence himself clearly does so because he is seeking to put forward evidence tending to show that he was elsewhere at a particular time. And that evidence is the evidence in support referred to in the subsection. We are therefore of the view that the words of s. 402A(1) given their natural meaning include the case where the accused alone is to testify that he was elsewhere at the material time. Thus, sub-s (1) standing by itself clearly means that notice must be given in all cases of an alibi defence, otherwise the evidence will be excluded. No distinction is made between an alibi defence of the accused alone and an alibi defence supported by witnesses. Subsection (2) sets out the particulars required in such a notice which is in two parts:

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(a) particulars of the place where the accused claims to have been at the time of the commission of the offence with which he is charged; and

(b) the names and address of any witnesses whom he intends to call for the purpose of establishing his alibi.

B

If the accused does not intend to call any witnesses, then he need only comply with part (a) of the notice.

[76] Later in its judgment the Federal Court said at p. 414:

C

the court cannot prevent an accused person from giving evidence. Having heard the evidence, then the trial court must decide the nature of the evidence. If it is only evidence of a bare denial, the evidence stays. If it is evidence in support of an alibi and no notice under s. 402A has been given, then he must exclude that part of the evidence from his consideration of the defence evidence.

D

[77] In the present appeal, having directed himself on the distinction between an alibi and a bare denial as explained in *Vasan Singh v. PP*, the learned trial judge considered the second accused's evidence and found it to be in support of a defence of alibi. Since no notice of alibi had been given that evidence must be excluded. This what the learned

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said in his judgment:

In the instant case, OKT2 affirmed that he was always in his hotel room and that when he was out of his hotel room he was never at the scene of the crime. OKT2 said he took what could only be described as a circuitous route from the porch to the guard house (see D44).

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That was not a denial but evidence tending to show that by reason of OKT2's presence at a particular place or in a particular area (that is, in his hotel room and or outside the immediate scene) at a particular time (during the commission of the offences) that he was not or was unlikely to have been at the place where the offences were committed

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at the time of commission. That was evidence that by reason of OKT2's presence in his hotel room and then outside the immediate scene at the material time of the commission of the crime that OKT2 was not, or was unlikely to have been at the scene where the crimes were committed at the time of commission. That was evidence from OKT2 that OKT2 was outside the scene at the time of the crimes and

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affirmative proof that OKT2 was elsewhere and that OKT2's presence elsewhere is inconsistent with OKT2's presence at the time and place alleged and with participation in the crime at the alleged time and place of the act alleged. That was evidence in support of an alibi. And without a notice of alibi, that evidence must be excluded.

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[78] We agree. The evidence given by the second accused is not one of a bare denial in the like of "I did not do it. I was not there and I was elsewhere" as illustrated in *Vasant Singh v. PP*. We find that he had given detailed evidence covering his movements from the time he

checked into the Sri Pelangi Hotel, Segamat on 23 April 1999 with his friends including the first accused until the time he checked out of and left the hotel in the early hours of 24 April 1999. In his testimony he explained his whereabouts before, during and after the time of the murders as stated in the charges. In this regard, he had testified that after returning to the hotel with Sankar, Jivakumar and Shanti after having their food, at about 5.10pm on 23 April 1999, he had gone to sleep in the room alone. At about 9pm on the same date he was awakened by one of his friends occupying the same room and then the first accused, Sankar and Jivakumar invited him to go out for dinner. He declined and continued to sleep in the room alone. Later, just before 12midnight, after giving him some packed food, the first accused invited him to go to the disco. Again he declined. He had a bath, ate his food and watched television. 15 minutes later he went back to sleep. Later still, he was awakened by one of his friends. When he got up, he saw blood stains on the ears and palm of the first accused who told him that he had been beaten up. The second accused told his friends to check out of the hotel and proceed straight away to Pak Yusof's house. After his friends left, he remained in the room for about 20 minutes before leaving the room and proceeding to the reception counter. Upon finding that the first accused, Sankar and Sivakumar were not at the counter, he proceeded to the porch of the hotel (marked E in P25), where he testified that he heard sounds coming from the side of the hotel (from the place marked N in P25). He saw more than ten persons moving about. He proceeded to the guard post. He marked the route he took from the porch (E in P25) by drawing dotted lines in D44. Effectively, the second accused said that in proceeding to the guard post from the porch, he had taken a path away from the place where the bodies of Ah Leong and Ah Soon were found lying on the road somewhere at the places marked N and O respectively in P25. At the guard post, he saw a car proceeding in the direction of the guard post. On seeing this, he stood up. The car stopped infront of him. It was driven by Sankar. He got into the car and sat next to Sankar. Sivakumar was seated at the back. The first accused was not in the car. Sankar asked, "Mana Dorai Pandian?". The second accused replied. "Dia ikut kamu, mengapa tanya saya". Sankar got out of the car and called out loudly for the first accused. The first accused ran towards the car, got into it and sat at the rear. They then proceeded to Pak Yusof's house. At Pak Yusof's house, he took a drink and slept on the sofa. At about 6.30am, he was arrested by the police. He denied giving any car key to the police. He testified that he had not left his hotel room, had not gone to the disco and had not quarrelled with anyone. He maintained that he had not stabbed anyone. In the nutshell the defence of the second accused was that he was never at the scene at the time the

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offences were committed. His defence was that at all material times he was in his hotel room, and when he was outside his hotel room he was not at the immediate scene of the crimes.

[79] It is clear to us that in support of his story that he was not at the scene at the material time, he had given an elaborate narration about his movements before, during and after the time of the offences. In doing so he had made specific reference to the roles played by the first accused, Sankar and Sivakumar in relation to his story regarding his movements at the material times. In addition, in his testimony, he introduced and made use of D44 to show the route he took when he moved from the porch to the guard post. The end result is that his testimony reveals that he had taken a path which had steered away from the places where the bodies of Ah Leong and Ah Soon were found lying. Apart from seeing more than ten persons moving about and hearing noises from the area marked N in P25, in his testimony, the second accused seemed to be saying that nothing happened at the area to his right (ie, somewhere around or near where the car was as shown in P25), as he walked from the porch to the guard post along the path which he had shown by dotted lines in D44. In our view, the evidence of the second accused is not evidence of a bare denial but detailed evidence in support of an alibi.

[80] Be that as it may, although he found the second accused's defence to be an alibi without a notice, the learned judge nevertheless proceeded to consider in depth the second accused's defence as though it was a denial, as well the evidence of his two witnesses. All this is clear from the judgment of the learned judge. He considered the second accused's denial in the light of the evidence adduced by PW9 and PW10. We find that the learned judge had given his most careful and anxious consideration on the issues relating to identification raised before him. He found the evidence before him compelling. In the end he found that the second accused had failed to raise any reasonable doubt and found him guilty on both the charges.

[81] We have carefully scrutinised the evidence on record and carefully examined the judgment of the learned trial judge. We are entirely satisfied that the convictions of the first and second accused are safe. In the result the appeals of the first and the second accused are dismissed. The convictions and sentences imposed on them by the High Court are affirmed.